Supreme Court, U.S.
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No. 97-___

In The

Supreme Court of the United States

October Term, 1997

RICKY BELL, WARDEN,

Petitioner,

v.

RONALD EUGENE RICKMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED FOR REVIEW

Is a court permitted to "presume" prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), to find a violation of the Sixth Amendment right to counsel, where defense counsel filed pre-trial motions, conducted direct and cross-examination, made objections, and fully participated in the defense of his client at trial, and where the court affirmatively found that the defendant suffered no actual prejudice from the deficiencies identified in his attorney's performance?

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General and Reporter of the State of Tennessee, on behalf of Ricky Bell, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the grant of respondent's petition for writ of habeas corpus, thereby vacating his conviction for first-degree murder and death sentence.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is published at 131 F.3d 1150. The opinions of the district court (App. 2 and App. 3) are reported at 864 F.Supp. 686 and 854 F.Supp. 1305.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1997. No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. Procedural History

Respondent Ronald Eugene Rickman ("respondent" or "Rickman") and his co-defendants, William Groseclose and Phillip Michael Britt, were all convicted by a jury in 1978 in the Criminal Court of Shelby County, Tennessee,

for the first-degree murder of Groseclose's wife, Deborah Groseclose. Britt, who was nineteen at the time of the offense, received a life sentence. The jury sentenced both Ronald Rickman and William Groseclose to death. The jury found as aggravating circumstances that Rickman committed the murder for remuneration or the promise of remuneration; that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and that the murder was committed while the defendant was engaged in committing rape, robbery, and kidnaping. Tenn. Code Ann. §§39-2404(i)(4), (5), and (7) (Repealed) now §§39-13-204(i)(4), (5), and (7) (1997). The jury also found that the mitigating circumstances did not outweigh the aggravating circumstances. The Supreme Court of Tennessee affirmed the convictions and sentences. *State v. Groseclose and Rickman*, 615 S.W.2d 142 (Tenn. 1981), and this Court denied certiorari. *Rickman v. Tennessee*, 454 U.S. 882 (1981).

Rickman then filed a petition for post-conviction relief, contending that ineffective assistance of counsel was rendered at trial. The Shelby County Criminal Court dismissed the petition, and the Court of Criminal Appeals of Tennessee affirmed the dismissal on February 16, 1984. (App. 4). The Tennessee Supreme Court denied Rickman's application for permission to appeal, and this Court denied certiorari. *Rickman v. Tennessee*, 469 U.S. 963 (1984). Rickman then filed two more post-conviction petitions, but relief was denied in each; the dismissals were affirmed on appeal.

On March 4, 1985, Rickman filed a petition for writ of habeas corpus in the United States District Court for the

Middle District of Tennessee. On April 25, 1994, the district court granted Rickman's motion for partial summary judgment, finding that the heinous, atrocious, or cruel aggravating circumstance had been unconstitutionally applied to Rickman's conviction, and thus vacating his death sentence. (App. 3). Then on September 2, 1994, the district court reviewed Rickman's guilt phase issues and concluded that he had received ineffective assistance of counsel at the guilt phase of trial. The court directed that a writ of habeas corpus issue unless the State afforded Rickman a new trial within 120 days. (App. 2).

In a two-to-one decision, filed December 2, 1997, the United States Court of Appeals for the Sixth Circuit affirmed the district court's order granting the writ based solely on the finding of ineffective assistance of counsel at the guilt phase of the trial. (App. 1).

II. Facts Relevant to the Petition

1. The proof at Rickman's trial is accurately summarized in the opinion of the Tennessee Supreme Court on direct appeal. *State v. Groseclose, supra,* 615 S.W.2d at 144-146 (App. 5 at 149-152).

William Groseclose planned the death of his wife for several weeks prior to the actual homicide. Groseclose, who had been discharged from his employment in the Navy Recruiting Service due to irregularities in his enlisting of recruits, contacted one of his former recruits, Barton Wayne Mount, in an effort to employ someone to murder Mrs. Groseclose. Mount placed him in touch with 19-year-old Phillip Michael Britt, who in turn contacted his former brother-in-law, Ronald Rickman. Ultimately,

with the knowledge and participation of Britt and Mount, Rickman agreed to perform the act for a specified and negotiated price. Britt was to share in the proceeds. Groseclose also promised to reward Mount.

The Tennessee Supreme Court described the murder as one of the most atrocious and inhuman conceivable. There was apparently a plan for Rickman to accost Mrs. Groseclose on the afternoon of June 28, 1977, and to frighten her to the point that she would report the incident to the police. She was then to be murdered on the next day. It was thought that the previous day's incident would divert suspicion from her husband. Indeed, Rickman approached Mrs. Groseclose in the parking lot near the place of her employment on the day before she was murdered, and when she would not talk with him, he followed her home in another automobile. This greatly alarmed Mrs. Groseclose, and she did contact the police.

Early the next morning, Groseclose left his residence taking his infant son with him and leaving the door unlocked. As soon as he was gone, Rickman and Britt entered the house through the unlocked door. Each raped Mrs. Groseclose. They then allowed her to bathe and dress, during which time Rickman advised her that there was a contract on her life. According to the phrase used by both Rickman and Britt, the terrified woman "plea bargained" with her attackers and offered to try to get money for them. They refused this offer, and Rickman proceeded to strangle Mrs. Groseclose into unconsciousness. Rickman then checked, and when he still detected a pulse, he stabbed Mrs. Groseclose three or four times in the back near the spinal cord. Thinking that she was dead, Rickman and Britt then placed Mrs. Groseclose's

body in the trunk of her automobile and drove the vehicle to a parking lot adjacent to the Memphis Public Library. As they drove to the library, Rickman became aware that Deborah Groseclose was not dead, and in a statement later introduced at trial, he said that he and Britt could hear her cries for help from the trunk.

Mrs. Groseclose was left locked in the trunk of her automobile in the broiling sun from about 9:00 a.m. on June 29 until her badly decomposed body was discovered in the trunk of her car during the early afternoon of July 4, 1977, a period of some five days. Medical testimony revealed that the injuries inflicted by Rickman would not have been fatal, but rather Mrs. Groseclose died from the excessive heat in the trunk of the automobile (systemic hyperthermia).

2. In his first post-conviction petition, Rickman contended that his attorney, Robert Livingston, was ineffective both at the guilt and penalty phases of the trial. As to the guilt phase, he argued that his attorney failed to perform adequate investigation and failed to investigate the possibility of an insanity defense. The state appellate court rejected these contentions, finding:

> The lawyer testified that he interviewed Rickman for several hours and discussed the witnesses listed as state's witnesses. Additionally, the lawyer left with him a nine page copy of a confession given by Rickman to officers and asked him to determine what parts were true and what parts were false. A week later, Rickman told the lawyer the entire statement was true.

> From this time the lawyer, with Rickman's approval, attempted to negotiate a plea of guilty. When it became obvious this case would be tried, the lawyer obtained from the state the substance of the testimony to be given by two of three key state's witnesses. The lawyer had the confession of Britt who was a codefendant. Rickman has not alleged that there were witnesses who could have exonerated him, nor did he show in the post-conviction proceeding that there existed any witnesses who could give him a defense. Beyond this, the lawyer testified the state granted him informal discovery of the case against his client within the rules.
>
> The record shows the lawyer asked for, and obtained, a psychiatric evaluation of Rickman prior to trial. The most we find in this record is that Rickman was found to be competent to stand trial.
>
> Rickman complains that his lawyer did not obtain copies of reports from a mental evaluation done of him at age 16 at an institution in South Carolina. Significantly, Rickman in his post-conviction proceeding makes no claim of mental incompetence at the time of the murder. Furthermore, if the record in South Carolina would show him to have been incompetent it was available to him in the post-conviction proceeding as it was prior to the original trial. Rickman has failed to show any prejudice in the matter of his mental competence.

Rickman v. State, Shelby County No. 9 (Tenn. Crim. App., February 16, 1984), slip op. at pp. 8-9 (App. 4 at 142).

As to the penalty phase of the trial, Rickman's primary complaint was that his attorney failed to put on any

mitigating evidence. The Tennessee appellate court rejected this claim as well, finding:

> In the post-conviction hearing, the lawyer testified that after the state's evidence was completed in the guilt phase, there was no doubt that Rickman and the others were going to be sentenced to death. Based on this judgment, the lawyer decided that the only thing he could do in an effort to save Rickman was to show his sordid past. The lawyer testified that there was a last ditch effort to persuade the jury that Rickman was abnormal, that he had had a more difficult childhood and history than the normal person in the hope that this would gain sympathy with the jury and avoid a sentence of death.
>
> This approach by the lawyer may very well be described as desperate, with little hope of success. However, when viewed in light of the overwhelming evidence of guilt of a murder described as "one of the most atrocious and inhuman conceivable," what in hindsight might appear desperate and unlikely of success becomes less startling in the face of the hopeless cause with which the lawyer was faced.
>
> . . . The fact is there are no mitigating circumstances available to Rickman to show. We are therefore not willing to set aside the verdict in this case on this basis, because there is no showing that it is reasonable to assume that a different result might have occurred had these tactics not been used.

Rickman v. State, Shelby County No. 9 (Tenn. Crim. App., February 16, 1984), slip op. at pp. 10-11 (App. 4 at 144-145).

III. The Opinions Below

1. In its initial memorandum opinion, the district court partially granted Rickman's motion for summary judgment and vacated Rickman's death sentence, finding that Tennessee's heinous, atrocious, or cruel aggravating circumstance was unconstitutionally vague. (App. 3 at 118-119). The court also found that the Tennessee Supreme Court failed to apply a limiting construction to the aggravating circumstance on appeal and failed to conduct a harmless error analysis based on the improper use of that aggravating circumstance. (App. 3 at 119-130).

2. In its second opinion, the district court considered Rickman's guilt phase issues and granted habeas relief based on the court's finding that: (1) Rickman was denied constitutionally effective assistance of counsel at the guilt phase of trial; (2) Rickman was denied due process and a fair trial because the state presented false and misleading testimony of a co-defendant and withheld material evidence concerning such false testimony; (3) Rickman was convicted on the basis of an unconstitutional "reasonable doubt" jury instruction; (4) Rickman was unconstitutionally administered medication that affected his demeanor and ability to assist with his defense at trial; and (5) Rickman was denied due process at the guilt phase of trial due to the cumulative effect of these errors. (App. 2 at 108-109).

As to Rickman's ineffective assistance of counsel claim, the district court found that Rickman's attorney, Robert Livingston, failed to investigate, prepare, and present a defense for Rickman. The court noted that,

although Livingston believed that Rickman was "abnormal" and knew that Rickman had received a psychiatric assessment at one time, Livingston failed to investigate or even recognize the mental defenses potentially available to Rickman. The district court concluded that these failures demonstrated deficient performance pursuant to the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The court went on to review the proof presented at the evidentiary hearings on collateral review and concluded that Rickman had failed to demonstrate that counsel's deficiencies, as significant as they were, resulted in any actual prejudice. (App. 2 at 67-69). The court nevertheless went on to find that Livingston did not subject the prosecution's case to meaningful adversarial testing. (App. 2 at 76). Thus, the district court held that prejudice should be presumed as in the limited category of cases discussed by this Court in *United States v. Cronic*, 466 U.S. 648 (1984). (App. 2 at 76-77).

3. In a two-to-one decision, the court of appeals affirmed the district court's order granting the writ of habeas corpus, finding that Rickman had not received effective assistance of counsel at the guilt phase of his trial. Just as had the district court, the majority of the court of appeals concluded that Rickman had shown deficient performance, but further concluded that Rickman suffered no prejudice as required by *Strickland, supra.* (App. 1 at 12-13). The court specifically rejected Rickman's premise that, if Robert Livingston had investigated and presented a lack of *mens rea* defense, there was a reasonable likelihood that Rickman would have been convicted of a lesser degree of murder. (App. 1 at 13). The

court found that the premise underlying Rickman's argument was simply incorrect, since Rickman's own statement, and the physical evidence presented at trial, showed that Rickman contracted with Groseclose to kill Deborah and proved that he intentionally killed her. Furthermore, even Rickman's own expert at the habeas evidentiary hearing "candidly acknowledged that Rickman understood the wrongfulness of his actions, [and] could conform his behavior to the requirements of the law." (App. 1 at 13). The court of appeals reviewed Livingston's questioning of the State's witnesses, along with his comments to the jury, and concluded that the effect of his entire performance was to deny Rickman any defense at all. (App. 1 at 15). The court thus concluded that this case fit within the parameters of *Cronic's* presumed prejudice standard.

The appellate court did so fully realizing that the Tennessee courts had rejected Rickman's ineffective assistance of counsel claim. The majority found, however, that the Tennessee appellate courts had focused only on Livingston's more routine failures and not on his abusive treatment of his client. (App. 1 at 14). The court also faulted the Tennessee Court of Criminal Appeals for failing to recognize that Livingston's behavior was exhibited both during the guilt and penalty phases of the trial, which failure led the Court of Criminal Appeals to be content to treat Livingston's actions simply as a sentencing strategy gone awry. (App. 1 at 14).

In his dissent, Judge Suhrheinrich expressed the view that this case did not fall within the narrow exception discussed in *dicta* in *Cronic*, but, rather, Rickman's complaint about his counsel's performance should be judged

by the two-prong test set out in *Strickland*. Judge Suhrheinrich agreed with the district court and the majority of the court of appeals that Rickman suffered no prejudice from his attorney's performance. (App. 1 at 25-26).

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE SPLIT AMONG THE CIRCUITS CONCERNING WHETHER PREJUDICE MAY BE "PRESUMED" UNDER *UNITED STATES V. CRONIC* FROM THE DEFICIENT PERFORMANCE OF COUNSEL WHO ACTIVELY DEFENDED THE ACCUSED AT TRIAL.

The Sixth Amendment to the United States Constitution provides, in relevant part, that, in all criminal prosecutions, the accused shall . . . "have the Assistance of Counsel for his defence". This Court has specified that the right to counsel means the right to "effective assistance of counsel." *See Powell v. Alabama*, 287 U.S. 45 (1932). Until *Strickland v. Washington*, 466 U.S. 668 (1984), the lower courts were in "disarray" concerning how to evaluate claims of ineffective assistance of counsel. *See United States v. Decoster*, 624 F.2d 196, 204 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 944 (1979). In *Strickland*, this Court established a two-prong test to be applied to claims of ineffective assistance of counsel. First, a defendant must show deficient performance by counsel and, second, that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Strickland, supra* at 687.

On the same day the watershed *Strickland* opinion was issued, this Court also decided another Sixth Amendment case – *United States v. Cronic*, 466 U.S. 648 (1984). *Dicta* in *Cronic* suggested that, in rare circumstances, the assistance of counsel might be so lacking that reviewing courts can presume prejudice to the accused, without inquiry into the actual impact of counsel's performance on the outcome of the trial. *Cronic*, 466 U.S. at 662. The lower courts are now in "disarray" concerning when the *Cronic dicta* may be applied to dispense with *Strickland's* requirement of demonstrating prejudice.

Of course, in *Cronic* itself, this Court refused to apply the presumption of prejudice. Although the circumstances regarding the late appointment of a young, inexperienced attorney outside his area of practice were not ideal, this Court found no basis for presuming prejudice because there was not a complete denial of counsel, nor circumstances amounting to a breakdown in the adversarial system. *Cronic*, 466 U.S. at 662. Attempting to illustrate the types of circumstances that might justify applying a presumption of prejudice, this Court referred to situations, in other contexts not involving allegations of ineffective assistance of counsel, that had been adjudged so likely to prejudice the accused that the cost of litigating their effect in a particular case was unjustified. *Cronic, supra*, 466 U.S. at 658 n. 24. For example, this Court has presumed prejudice in cases involving the pervasive influence of the news media, where the proceedings were "entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Murphy v. Florida*, 421 U.S. 794, 801 (1975);

Rideau v. Louisiana, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). This Court has also presumed prejudice where an involuntary confession has been introduced into evidence, or where a co-defendant's statement inculpating the defendant has been improperly introduced into evidence. *See Payne v. Arkansas*, 356 U.S. 560 (1958); *Jackson v. Denno*, 378 U.S. 368 (1964); *Bruton v. United States*, 391 U.S. 123 (1968).

There are some situations involving the right to counsel that are so clearly analogous to those listed as examples in footnote 24 of *Cronic* that there is no question but that *Cronic*'s presumption of prejudice should apply. As this Court pointed out in *Cronic*, the most obvious situation for applying the presumption of prejudice in the Sixth Amendment context is where there has been a complete denial of counsel. *Cronic, supra*, 466 U.S. at 659. But the Court also suggested in *Cronic* that prejudice may be presumed when there has been a "constructive" denial of counsel. The lower courts are now split concerning the types of circumstances that may give rise to a "constructive" denial of the effective assistance of counsel, and this Court's guidance is needed to resolve the issue.

Courts have found constructive denial of counsel in three basic contexts. The clearest cases are those where counsel has been inactive, essentially amounting to providing no defense at all, or where counsel has been absent during critical portions of the trial. For example, in *Martin v. Rose*, 744 F.2d 1245 (6th Cir. 1984), the court found constructive denial where the attorney chose to sit mute throughout his client's trial. After the attorney's motion for continuance was denied, his strategy was to

sit quietly throughout the trial and then to rely on his pre-trial objections for appeal after his client was convicted. The court found the petitioner did not need to show prejudice since his attorney's refusal to participate in the trial resulted in there being no adversarial testing of the prosecution's case whatsoever. *Id.*, at 1250. Similarly, the court found constructive denial of counsel in *Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996), where counsel slept for extended periods throughout the trial. As a final example in this category, in *Green v. Arn*, 809 F.2d 1257 (6th Cir. 1987), *vacated on other grounds*, 484 U.S. 806 (1987), the court found constructive denial of counsel where the defendant's lawyer was absent during the cross-examination of a critical government witness by a co-defendant's attorney. In each of these cases, competent counsel was appointed, but the attorneys either took no steps whatsoever to represent their clients, or failed at critical junctures to serve the interest of their clients.

The second category of constructive denial cases are those in which courts have found structural impediments to the effective assistance of counsel. In *Cronic, supra*, 466 U.S. at 662 n. 32, this Court noted that it had presumed prejudice when counsel labored under an actual conflict of interest. As a similar example of a structural impediment, this Court referred to *Powell v. Alabama*, 287 U.S. 45 (1932), where an out-of-state lawyer was appointed only six days before a complex capital case. In *Powell* this Court did not examine the actual performance of counsel at trial, but instead concluded that under the circumstances, the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair. *Cronic, supra*, 466 U.S. at 660.

Some lower courts have also created a third category of cases where they have applied the *Cronic* presumption, despite the fact that the accused was represented by a lawyer, and the lawyer actively participated in the case. Other federal courts, however, have rejected this expansive view of the *Cronic dicta*, holding that prejudice should never be presumed in cases such as this one, where the thrust of the defendant's Sixth Amendment claim focuses upon specific deficiencies in defense counsel's actual performance whose effect on the outcome of the trial can be readily ascertained.

For example, the First Circuit Court of Appeals in *Scarpa v. Dubois*, 38 F.3d 1 (1st Cir. 1994), *cert. denied*, 513 U.S. 1129 (1995), refused to affirm the district court's expansive application of *Cronic*. In that case, the district court had granted relief because the attorney's trial strategy was based on a misunderstanding of the elements of the crime charged. The circuit court, although acknowledging that the defense had been inadequate, found *Cronic* inapplicable since the attorney was present and participated throughout the trial. The court held that a *Strickland* analysis should be applied in such circumstances.

Similarly, the Fifth Circuit has declined to allow *Cronic* to be "stretched to encompass" the failure of an attorney to conduct an investigation into two of three armed robberies with which his client was charged. *Woodward v. Collins*, 898 F.2d 1027, 1028 (5th Cir. 1990). *See also Toomey v. Bunnell*, 898 F.2d 741, 744 n.2 (9th Cir. 1990), *cert. denied*, 498 U.S. 960 (1990). (Majority declined to apply *Cronic* where attorney "actively participated" at

trial, noting that "[w]e have applied the *Cronic* exception very sparingly".).

On the other hand, other circuits have stretched the *Cronic dicta* to apply to such facts. The Ninth Circuit, despite adopting a narrow view of *Cronic* in *Toomey, supra,* applied an expansive interpretation in *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991). There, the attorney failed to call any witnesses and conceded in closing argument that there was no reasonable doubt as to the factual issues presented at trial.[1] In *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988), the Tenth Circuit applied *Cronic* where the defendant's attorney refused to pursue any non-statutory mitigating circumstances and argued that his client's actions were atrocious.[2]

Clearly, the circuits are in disarray concerning whether a court may apply the *Cronic dicta* to find a "constructive" violation of the Sixth Amendment, in cases where counsel has been neither absent nor inactive, but merely inept, and where there was no structural impediment that prevented counsel's effective functioning. Bad lawyering, no matter how bad, should not require the *per se* presumption of prejudice under *Cronic*. Rather, the *Strickland* analysis is fully competent to vindicate the accused's Sixth Amendment right to counsel in such

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[1] The Fifth Circuit explicitly disagreed with the application of *Cronic* to the facts presented in *Swanson*. *Childress v. Johnson*, 103 F.3d 1221, 1229 (5th Cir. 1997).

[2] The First Circuit explicitly disagreed with the Tenth Circuit's application of *Cronic* to these facts. *Scarpa v. Dubois, supra*, 38 F.3d at 12.

cases. Here, Rickman's counsel met with his client, studied Rickman's confession with him "word for word", engaged in plea negotiations, conducted direct and cross-examination of various witnesses, and made objections at trial. In other words, he was not absent or inactive, and he was not precluded from rendering effective assistance by any structural impediment – circumstances that might justify application of the *Cronic* presumption because their impact on the outcome of the trial cannot be accurately measured. Rather, the quality and effect of the lawyering afforded Rickman is fully capable of accurate assessment under *Strickland*. And both the district court and the court of appeals affirmatively found that Rickman suffered *no* prejudice from his attorney's acts or omissions.

As Judge Suhrheinrich's dissenting opinion below points out, applying *Cronic* to these facts replaces case-by-case litigation over prejudice with case-by-case litigation over prejudice *per se*. Application of *Cronic*'s presumption of prejudice to this situation obfuscates the entire rationale of *Cronic* and ignores the clear dictates of *Strickland*. (App. 1 at 34-35). There is a conflict among the circuits concerning the circumstances under which prejudice may be presumed under *Cronic* to find a Sixth Amendment violation. The lower courts need guidance as to the parameters and proper application of the *Cronic dicta*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RONALD EUGENE RICKMAN,	:	Nos. 94-5721/
Petitioner-Appellee/ Cross-Appellant,	:	94-6232/94-6538
v.	:	
RICKY BELL, Warden,	:	
Respondent-Appellant/ Cross-Appellee.	:	

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 85-00256 – John T. Nixon, Chief District Judge.

Argued: April 24, 1997

Decided and Filed: December 2, 1997

Before: KEITH, RYAN, and SUHRHEINRICH, Circuit Judges.

COUNSEL

ARGUED: Kathy Morante, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant. Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellee. **ON BRIEF:** Kathy Morante, Glenn R. Pruden, Gordon W. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant. Paul R. Bottei, Henry A. Martin, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville,

Tennessee, William P. Redick, Jr., Whites Creek, Tennessee, for Appellee.

RYAN, J., delivered the opinion of the court, in which KEITH, J., joined. SUHRHEINRICH, J. (pp. 21-34), delivered a separate dissenting opinion.

OPINION

RYAN, Circuit Judge. Ricky Bell, the warden of the Tennessee Riverbend Maximum Security Institution and the respondent in this proceeding, appeals from the district court's judgment granting a writ of *habeas corpus* to petitioner Ronald Eugene Rickman pursuant to 28 U.S.C. § 2254. Rickman has filed a cross-appeal from the district court's denial of several of his constitutional claims.

Although both parties advance numerous issues, we find only one necessary to our resolution of this appeal. Concluding that the district court correctly found Rickman to have been unconstitutionally denied effective assistance of counsel under the Sixth Amendment, we will affirm.

I.

A.

In February 1978, William E. Groseclose was convicted of murder in the first degree in connection with the killing of his wife, Deborah Lee Groseclose, on June 29, 1977. The prosecution's theory was that Groseclose

hired petitioner Rickman and another man, Phillip Michael Britt, to kill Deborah. Groseclose was alleged to have contacted Barton Wayne Mount, a naval recruit Groseclose met while Groseclose was employed in the Navy Recruiting Service, in an effort to employ someone to murder Mrs. Groseclose. *State v. Groseclose*, 615 S.W.2d 142, 144 (Tenn. 1981). Mount referred Groseclose to Britt, who, in turn, contacted Rickman, Britt's former brother-in-law. Rickman agreed to commit the murder in cooperation with Britt, a fact of which Mount was aware. Groseclose agreed to pay a particular price in which Rickman, Britt, and Mount would all share.

The Tennessee Supreme Court in its joint opinion affirming both Groseclose's and Rickman's convictions described the murder as "one of the most atrocious and inhuman conceivable." *Id.* at 145. According to the evidence presented by the State at trial, Rickman, acting pursuant to the conspiracy, accosted Deborah the day before the murder "to frighten her to the point that she would report . . . the incident to the police," in an attempt to later divert suspicion for the planned murder from her husband. *Id.* The next morning, Groseclose left his house with the couple's infant son, leaving the back door unlocked. Rickman and Britt then entered the house; each raped Deborah Groseclose, and then told her "there was a 'contract' on her life." *Id.*

After listening to Deborah "plead" for her life by offering money to her assailants, Rickman "proceeded to strangle Mrs. Groseclose into unconsciousness" and then, because he detected a pulse, to stab her three or four times in the back. *Id.* Rickman and Britt placed Deborah in the trunk of her car, apparently believing her to be

dead, and "drove the vehicle to a parking lot adjacent to the main Memphis Public Library." *Id.* Despite hearing Deborah's "cries for help from the trunk," *id.*, Rickman left her there, abandoning the car. Deborah's body was discovered five days later, and the medical testimony at trial suggested that she would not have died from her injuries, but died instead as a result of the excessive heat in her car trunk.

During the investigation that followed, police were led to Rickman and Mount through information given by Rickman's roommate. Rickman and Britt both gave inculpatory statements to the police, as did Mount. Mount, in fact, testified for the State at the trial of Rickman, Britt, and Groseclose, and later pleaded guilty to second-degree murder.

B.

Jury selection began for the joint trial on February 13, 1978, and was completed on February 17. The trial began on February 18 and was concluded on February 28. The sentencing hearing was held between March 1 and March 3.

The State presented 39 witnesses during the guilt phase of the trial. None of the defendants testified during the guilt phase. All three defendants were convicted of murder in the first degree and both Rickman and Groseclose were sentenced to death. Britt received a sentence of life imprisonment.

The Tennessee Supreme Court affirmed Rickman's conviction in 1981, *Groseclose*, 615 S.W.2d 142, and the

U.S. Supreme Court denied his petition for writ of *certiorari, Rickman v. Tennessee,* 454 U.S. 882 (1981). Rickman then filed a petition for post-conviction relief in January 1982, arguing, *inter alia,* that he had received constitutionally ineffective assistance of counsel. The trial court denied the petition in December 1982, after holding an evidentiary hearing. The Court of Criminal Appeals affirmed the denial in February 1984. *Groseclose v. Tennessee,* No. 9 (Tenn. Crim. App. Feb. 16, 1984). The Supreme Court of Tennessee denied the subsequent application for permission to appeal, and the U.S. Supreme Court denied the petition for writ of *certiorari. Rickman v. Tennessee,* 469 U.S. 963 (1984).

Rickman filed the petition for writ of *habeas corpus* at issue here on March 5, 1985, amending it in July 1990, November 1992, and January 1994. In 1994, Rickman filed a motion for partial summary judgment, and the State filed a cross-motion for partial summary judgment in response. The district court granted Rickman's motion in part, and ordered a new sentencing proceeding based on perceived flaws in the jury instructions on capital punishment. *Rickman v. Dutton,* 854 F. Supp. 1305 (M.D. Tenn. 1994). The State filed a notice of appeal following the district court's determination that there was no just reason to delay entry of its partial judgment, pursuant to Fed. R. Civ. P. 54(b).

The district court later addressed the remaining issues in Rickman's *habeas* petition, first holding an evidentiary hearing. The court held Rickman's conviction to have been unconstitutional for two reasons: the constitutionally ineffective assistance of counsel and the cumulative effect of other errors resulting in a denial of due

process. *Rickman v. Dutton*, 864 F. Supp. 686 (M.D. Tenn. 1994). The district court simultaneously rejected, however, several of Rickman's arguments.

The State again filed a timely appeal, and amended its notice of appeal following the district court's partial grant of Rickman's motion to amend the judgment. Rickman filed a cross-appeal following the district court's grant of a certificate of probable cause.

II.

Although we review *de novo* the district court's disposition of a petition for writ of *habeas corpus*, we review the district court's factual findings only for clear error. *See McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 2422 (1997). Further, federal courts must defer to state court factual findings, according to them a presumption of correctness that the petitioner may rebut only with clear and convincing evidence. *Id.* However, "[t]he presumption only applies to basic, primary facts, and not to mixed questions of law and fact," which receive *de novo* review. *Id.*

A claim of ineffective assistance of counsel presents a mixed question of law and fact, for which both the state-court and district-court determinations are subject to *de novo* review by this court. *See Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992); *Smith v. Jago*, 888 F.2d 399, 407 (6th Cir. 1989).

> [I]n a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to

> the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t.]" Rather, . . . it is a mixed question of law and fact. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Strickland v. Washington, 466 U.S. 668, 698 (1984) (citations omitted); *accord McQueen*, 99 F.3d at 1310-11.

In setting forth this standard of review, we note the parties' disagreement as to the effect of the recent amendments to 28 U.S.C. § 2254 contained in section 104 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996). Although the AEDPA became effective on April 24, 1996, and although it mandates significant changes to the federal courts' treatment of both factual and legal issues in the *habeas* setting, the Supreme Court's recent decision in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), instructs that those changes do not apply to this case, or to any case pending at the time of the AEDPA's enactment; instead, those changes "generally apply only to cases filed after the Act became effective." *Id.* at 2068. Because Rickman filed his *habeas* petition in 1985, we are left to apply section 2254(d) as it existed prior to enactment of the AEDPA. *See id.*

III.

Rickman was represented at trial by Robert I. Livingston, court-appointed counsel. Although Rickman's *habeas* petition challenges Livingston's performance during both the guilt and the penalty phases of his trial, the district court below addressed only the guilt phase, finding it unnecessary to address the penalty phase. It concluded that Livingston had rendered ineffective assistance of counsel to Rickman, as evidenced by a variety of deficiencies, including Livingston's failure to investigate the case or to prepare for trial; his failure to consider the possibility of an insanity defense for Rickman; and the overwhelming hostility he evidenced toward his client throughout the proceedings. The district court nonetheless concluded that Rickman failed to show that Livingston's deficient performance resulted in any prejudice, both because the evidence against Rickman was so overwhelming and because Rickman was unable to show that any line of defense, including an insanity defense, would have benefitted him. This absence of actual prejudice, however, was not fatal to Rickman's claim, according to the district court, because Livingston's hostility and inadequacy effectively robbed Rickman of *any* representation whatsoever, thus eliminating the need for a showing of actual prejudice.

The district court's reasoning relied on its interpretation of *United States v. Cronic*, 466 U.S. 648 (1984), the companion case to the bellwether ineffective-assistance case, *Strickland v. Washington*. In *Strickland*, the Court for the first time "consider[ed] the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set

aside because counsel's assistance at the trial or sentencing was ineffective." 466 U.S. at 671. The Court concluded that, whether the focus is the trial or the sentencing, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

The *Strickland* Court announced a two-part test to be applied in the usual case: a showing of seriously deficient performance coupled with a showing "that the deficient performance prejudiced the defense." *Id.* at 687. The Court established an objective test for the first prong: "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness," as judged simply by "prevailing professional norms." *Id.* at 687-88; *accord Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Indicia of objective unreasonableness include the violation of "certain basic duties" inherent in the representation of a criminal defendant, among them a "duty of loyalty" to the client, from which derive "the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland*, 466 U.S. at 688. In addition, "[c]ounsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* In assessing deficient performance, the Court cautioned, reviewing courts must

take care to avoid "second-guess[ing]" strategic decisions that failed to bear fruit. *Id.* at 689.

Turning to the second, "prejudice" prong of its test, the *Strickland* Court held that a defendant must show more than "that the errors had some conceivable effect on the outcome of the proceeding"; instead, the defendant must be able to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 693-94. No matter how deficient an attorney's performance, the *Strickland* Court reasoned, in the absence of a showing of prejudice, "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable," and a defendant is, thus, not entitled to a new trial or sentencing. *Id.* at 687.

But following immediately on the heels of its articulation of the prejudice requirement, the Strickland Court provided for an exception in rare circumstances. In some instances, a court must simply presume that prejudice resulted:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is

directly responsible, easy for the government to prevent.

> One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. . . . [P]rejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests.

Id. at 692 (citations omitted).

In *Cronic*, the Court elaborated on the presumed-prejudice exception to which it alluded in *Strickland*, recognizing that "[t]here are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. The fundamental question, the *Cronic* Court suggested, is whether the trial "process [has lost] its character as a confrontation between adversaries"; if so, then "the constitutional guarantee is violated." *Id.* at 656-57. And then, it is not necessary to demonstrate actual prejudice.

This circumstance may arise in several different contexts. "Most obvious," the Court noted, "is the complete [(i.e., actual)] denial of counsel." *Id.* at 659. That, of course, is not at issue here. But the *Cronic* Court also noted the possibility of a *constructive* denial of counsel, when, although counsel is present, "the performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided." *Id.* at 654 n. 11. Equally important,

the Court held, is the case in which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," because "then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659. The Court concluded with a rather imprecise dictate: that the inquiry into *actual* prejudice may be dispensed with "only when surrounding circumstances justify a presumption of ineffectiveness." *Id.* at 662.

The "narrow" exception carved out by *Cronic*, then, provides a reviewing court with some difficulty in application. *See Childress v. Johnson*, 103 F.3d 1221, 1229 (5th Cir. 1997). And it is the State's principal argument on appeal that the district court erred in applying the *Cronic* exception. The circumstances here, it argues, were not of sufficient magnitude to invoke *Cronic*. Here, it contends, there simply was no *bona fide* defense available, and the Sixth Amendment does not require a lawyer to invent one. The State characterizes the hostility and disgust Livingston exhibited toward his own client, the particulars of which we will fully describe below, concomitant with his unnecessarily eliciting testimony from witnesses that would necessarily horrify the jury, as a legitimate strategy, albeit one that, predictably, was doomed to failure. The State then concludes that, it being inappropriate to presume prejudice, the writ of *habeas corpus* should not have issued because there was no showing of actual prejudice; that is, there is no reasonable probability that but for Livingston's errors, Rickman would have been found not guilty.

The State claims, and the district court found, that Rickman is unable to show actual prejudice resulting

from Livingston's representation as that concept is understood in the second prong of the *Strickland* analysis. Rickman argues that if Livingston had investigated and presented a defense of lack of *mens rea*, there is a reasonable likelihood that Rickman would not have been convicted of first-degree murder, and contends that such a defense was viable because the physical evidence and even his confession were consistent with the position that he merely sought to incapacitate Deborah Groseclose, not to kill her. The premise underlying this argument is simply incorrect. As the State points out, Rickman's statement and the physical evidence showed that Rickman contracted with Groseclose to kill Deborah, and that he intentionally killed her. The fact that he was ineffective in his initial attempts to kill her simply does not amount to a lack of intent to kill. And as the State also observes, even Rickman's own expert at the *habeas* evidentiary hearing "candidly acknowledged that Rickman understood the wrongfulness of his actions, [and] could conform his behavior to the requirements of the law." We agree, then, that the district court correctly concluded that Rickman has not shown prejudice as understood in *Strickland*.

Thus, only if Livingston's performance was so egregious as to amount to the virtual or constructive denial of the assistance of counsel, and thus implicate the *Cronic presumption* of prejudice, can Rickman succeed. And this, we conclude, was the case. Livingston's behavior can be termed nothing short of shocking and professionally outrageous. We are aware, of course, that the

Tennessee trial court rejected Rickman's ineffective-assistance claim. That court, however, focused only on Livingston's more routine failures – his failure to investigate the case, and his failure to communicate with his client – which, while certainly indicative of a seriously deficient performance, were not so inept as to give rise to a presumption of prejudice. The only mention of Livingston's abusive treatment of his own client is rather jejune, however, with no consideration of the particulars of Livingston's behavior:

> The Court does not find that Mr. Livingston's trial techniques or strategic procedures are shocking as submitted by the petitioner. From the outset, Mr. Livingston's strategy was to save the life of the petitioner. The Court has had the opportunity to observe Mr. Livingston for a number of years as an adversary counsel and from the trial bench and always found him to be a worthy and resourceful lawyer.

In affirming the trial court's decision, the Tennessee Court of Criminal Appeals was less reluctant to confront the egregiousness of Livingston's behavior, deeming it a "serious issue." It apparently failed to recognize, however, that Livingston's behavior was exhibited both during the guilt phase as well as during the sentencing phase; this failure led it to be content to treat Livingston's actions simply as sentencing strategy gone awry:

> In the post-conviction hearing, [Livingston] testified that after the state's evidence was completed in the guilt phase, there was no doubt that Rickman and the others were going to be sentenced to death. Based on this judgment, the lawyer decided that the only thing he could do

> in an effort to save Rickman was to show his sordid past. The lawyer testified that there was a last ditch effort to persuade the jury that Rickman was abnormal, that he had had a more difficult childhood and history than the normal person in the hope that this would gain sympathy with the jury and avoid a sentence of death.
>
> This approach by the lawyer may very well be described as desperate, with little hope of success. However, when viewed in the light of the overwhelming evidence of guilt of a murder described as "one of the most atrocious and inhuman conceivable," what in hindsight might appear desperate and unlikely of success becomes less startling in the face of the hopeless cause with which the lawyer was faced.

But our thorough review of the record and consideration of the circumstances of the overwhelming evidence of Rickman's guilt leave us, like the district court below, appalled by Livingston's performance. As we shall describe, Livingston combined a total failure to actively advocate his client's cause with repeated expressions of contempt for his client for his alleged actions. The effect of all this was to provide Rickman not with a defense counsel, but with a second prosecutor. And while the State makes a claim that Livingston was pursuing a strategy of painting a picture of his client that would make the jury find him too pitiable to convict or sentence to death, this simply stretches imagination past the point of credulity. Livingston succeeded in creating a loathsome image for Rickman – one that would make a juror feel compelled to rid the world of him.

Livingston's abandonment of his client's interests commenced almost immediately upon their first meeting:

> Livingston[ ] testified that after being assigned Rickman's case, he interviewed Rickman and asked him if a statement he had given to the authorities was "true." Livingston then stated that, after being told by Rickman that the statement was true, "From that point on, my defense was to persuade the District Attorney of Shelby County to allow Ronald Rickman to enter a plea of guilty and accept the life sentence. . . . " Livingston assumed that there was no defense to the charge of first-degree murder and failed to conduct any investigation.
>
> Livingston acknowledged that he only presented a defense at the sentencing phase of trial. With respect to the guilt phase of trial, he asserted, "There was no defense." Accordingly, Livingston did not interview any witnesses, conduct any legal research, or obtain and review any records, including those regarding Rickman's employment, education, mental health, social services contacts, military service, or prison experience. By Livingston's account, he spent a total of sixteen hours preparing for Rickman's trial. Livingston's preparation consisted solely of interviews he conducted with Rickman.

Rickman, 864 F. Supp. at 699-700 (footnote and citations omitted).

Livingston was not content with mere nonfeasance, however. In addition to failing to construct any rational defense theory, he embarked on a course of attempting " 'to persuade the jury that his client, although judged legally competent to stand trial, [was], in fact, abnormal

and should not be judged as a normal person.' " *Id.* at 700. According to Livingston, he " 'was trying to show the jury that we had a sick boy on trial, a subnormal, abnormal human being on trial. . . . That was my whole object of the whole defense, was [to] try to convince the jury that we had a sick man on trial.' " *Id.* It was what Livingston did in order to effect this purpose that is so stunning, and that correctly led the district court to conclude that Rickman was "[f]unctionally . . . totally denied counsel even though his attorney [was] physically present during the proceedings." *Id.* at 701. In our view, Rickman would have been better off to have been merely denied counsel; as it was, he had to endure attacks from his own attorney that equaled or exceeded those of the prosecution.

Had Livingston, despite eschewing an insanity defense, for which apparently there was no evidence, sought nevertheless to show, *in the evidence*, that Rickman was a "sick boy" we might characterize the effort as a weak tactic unlikely to succeed, but at least a tactic. But what he did instead was to convey to the jurors an unmistakable personal antagonism toward Rickman, characterized both by attacks on Rickman and by repeatedly eliciting information detrimental to Rickman's interests. Examples of the latter may be found in Livingston's cross-examination of Mount, the go-between for Rickman and Groseclose, during the guilt phase of the trial, as summarized by the district court:

> Livingston suggested to Mount that Mount had carefully planned out the crime with Rickman and the other co-defendants "to the nth degree," listing the name of each co-defendant separately

> for greater emphasis. Livingston reinforced the notion of planning despite proof which suggested that the defendants entered the victim's residence without a lethal weapon and may have lacked a coherent plan at that point as to how she was to be killed.

Id. at 702. Likewise, Livingston questioned several different witnesses concerning a hand grenade detonator and a motorcycle jacket that allegedly belonged to Rickman. Rather than attempting to disassociate Rickman from these objects, Livingston's questioning was aimed at linking Rickman to them and simultaneously demonstrating contempt for their owner. But he went even further, presenting at least one witness to describe Rickman's threats to commit unrelated crimes. Livingston questioned Rickman's girlfriend as follows:

> Q. Did Ron ever tell you he was going to blow somebody up with it? [referring to the grenade detonator]
>
> A. He was always threatening to bomb the 7-Eleven stores . . . but I didn't believe him.
>
> Q. What other crimes did he tell you he was going to commit that you didn't believe?
>
> A. Is that really important?
>
> Q. Yes, ma'am.
>
> A. He was always talking about catching some buildings on fire if he was mad at somebody. . . . One time he threatened to kill a person over me.

Id. at 702-03. Of another witness, he asked, referring to the motorcycle jacket, "Do you think average red-blooded American boys wear something like this . . . ?" *Id.* at 703.

Then, with regard to the hand grenade detonator, he asked the same witness, "Do you think a normal red-blooded American boy would walk around with a live grenade? What do you think about that?" *Id.*

Livingston's attacks on Rickman took the form of portraying him as crazed and dangerous. He repeatedly asked Mount, for example, whether Mount thought Rickman was "nuts," and ridiculed Mount's demurrer by saying, "You wouldn't know a psychiatric case if you saw one, would you?" *Id.* at 702. Likewise, he asked Rickman's girlfriend whether Rickman 'act[ed] like a bull . . . I mean, violent. . . . " *Id.* She responded, "When he was mad, yes." *Id.* When another witness, a neighbor of Rickman's and a member of the Marine Corps, testified that he considered Rickman to be a gentleman, Livingston ridiculed him as well, saying: "[Nineteen] years in the Marines and you would think that a man that looked like that was a gentleman?" *Id.* at 703.

The district court viewed an exchange between Livingston and two witnesses who had seen Rickman in Deborah Groseclose's car as best illustrating Livingston's demonstrated contempt for his client. Livingston questioned the first witness as follows:

> Q. Did he appear to be intoxicated?
>
> A. I don't think so.
>
> Q. Did he appear to be under the influence of any type of narcotic drug?
>
> A. I really don't know.
>
> Q. What about his eyes? Did he kind of have a wild, glassy look in his eyes?

A. I didn't look at his eyes.

Q. You just looked at that grin on his face.

A. Well, he just turned his head and smiled. I didn't think anything of it. . . .

Q. Normal looking fellow, wasn't he?

A. I guess so.

Q. . . . Yeah. You wouldn't call somebody that looked like this a normal, average, American looking boy, would you? [demonstrating Rickman's mug shot]

A. In this day and time, yes.

Q. . . . Thank God, I'm abnormal.

Id.

The second witness was questioned in a similar vein:

Q. You haven't been out on the street today then, have you? Woods is full of them, didn't you know that? Guys that look like this. Long hair. Long beard. Wild eyed. You know they're out there, don't you? I know they're out there.

A. Right.

Q. Grinning. Like they just got out of somebody's insane asylum. You know what I'm talking about, don't you?

A. I know what you're talking about.

Id.

Perhaps the most jarring evidence of Livingston's patent hostility toward Rickman may be found in a soliloquy he pronounced during the sentencing proceeding,

complete with an apology to the prosecutors for the crime:

> I know this young woman was put in the trunk of that car. That's no secret. I know that. And I'm not happy about it. No, sir. I'm not happy. I'm ashamed. I'm ashamed that we live in such a world. . . . I'm ashamed that this crime has been committed in our community. And I want the family of Debra [sic] Groseclose to know that. That I'm ashamed. I'm ashamed that this young woman died in this oven. Mr. Miller, I'm ashamed. I'm ashamed, Mr. Stanton. I don't condone murder. I know criminal defense lawyers suffer from what is called guilt by association. When I go to church Sunday, they are going to waylay me out at the Bellevue Baptist Church
>
> . . . .
>
> . . . .
>
> . . . [T]hat wild man [Rickman] over there with the gloves on – look at him. He's wild as a March hare, right now. He may take off after me in a minute. I don't know. He's crazy. I know he's crazy. Because if he's normal I can only say, thank you, God, I'm abnormal, an [sic] you are abnormal.

Id. at 704 n. 9.

While our research reveals no cases in which a defense attorney behaved with this degree of hostility toward his client, it is quite clear that Livingston's performance dispenses with the necessity of a separate showing of prejudice; it is, in this case, patently inherent. Courts have consistently treated similar behavior as an abandonment of the duty of loyalty, or as a conflict of interest. *See*

United States v. Swanson, 943 F.2d 1070, 1074-75 (9th Cir. 1991). And courts have rightly viewed the equivalent of what Livingston did in this case to be worse than no representation at all:

> [A]n attorney who is burdened by a conflict between his client's interests *and his own sympathies* to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.

Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1988) (emphasis added); *see Don v. Nix*, 886 F.2d 203, 207 (8th Cir. 1989); *cf. Houchin v. Zavaras*, 107 F.3d 1465, 1471 (10th Cir. 1997).

We find it simply incredible that the most damaging images of Rickman came from his own attorney. Livingston was not confronted with witnesses eager to label Rickman as "nuts" or "just . . . out of somebody's insane asylum"; he was not battling a prosecutor attempting to make irrelevant references to the hand grenade and the motorcycle jacket; he did not face an improper appeal to convict because of community sentiment in his opponent's closing. All of these outrageous tactics were introduced by Livingston himself, Rickman's own attorney. Livingston succeeded in presenting a terrifying image of Rickman, and thereby aligned himself with the prosecution against his own client.

Livingston's behavior cannot be characterized as legitimate trial strategy; no rational individual could think that painting a picture of one's client even more frightening than the prosecution could paint, would do anything other than doom the client. It is significant, too,

that Livingston's appalling tactics were employed during both the guilt and the sentencing phases. If, as the state appellate court believed, Livingston began his abuse of Rickman only at sentencing, it might be more conceivable that he was just undertaking a desperate and poorly executed strategy. As it was, however, Livingston tried to convince the jury that Rickman was "subnormal," violent, and with criminal propensities even as they were assessing whether he had in fact committed the crime. He went so far as to express personal sympathy for the prosecution and shame for representing Rickman.

If Livingston had been attempting to characterize Rickman as a hapless loser, or as someone who had suffered hard knocks through life, he might arguably have been pursuing a legitimate strategy. But his own testimony makes clear that Livingston had no such aim in mind: he simply wished to portray his client as vicious and abnormal. This is simply not a legitimate defense. Further, it is a portrayal that could only have encouraged the jury to put aside any doubts and convict speedily. The effect Livingston created was not one of pity for a pathetic Rickman, but one of hostility toward the hated and violent freak. Thus, while there may be a gray area where an attorney simply is unsuccessful at depicting his client in a sympathetic light, this case plainly falls way outside those boundaries. And it is impossible to read Livingston's statements and think that this was simply an inadvertent accident, a strategy gone awry. We obviously cannot read Livingston's mind, but his performance was so outrageous that it is not necessary for us to decide whether we can impute actual bad faith to him. If the effect he created was unintentional, it matters not to

Rickman, who has been convicted and sentenced to death; it was just as fatal.

We have approached this case with great caution, conscious of the important limitations of our role as a federal court reviewing in *habeas* the conclusions of the Supreme Court of the sovereign state of Tennessee – limitations we deeply respect. We recognize, too, the import of a decision that mandates another trial for an individual concerning whom there is little question as to his guilt of a killing committed 20 years ago. But we are constrained to observe that what the Tennessee judiciary permitted to occur here was nothing less than the evisceration of the right-to-counsel that is guaranteed by the Sixth Amendment and as much a travesty for our entire judicial system as it is for Rickman individually. The display of Rickman's trial, if allowed to stand, would simply mock fundamental constitutional guarantees of "vital importance." *Strickland*, 466 U.S. at 685. The Court's recognition that " 'the right to counsel is the right to the *effective* assistance of counsel,' " *id.* at 686 (emphasis added) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970)), would be devoid of meaning were counsel like Livingston deemed effective.

IV.

We conclude that Rickman was effectively deprived of counsel, in violation of the Sixth Amendment. Accordingly, we **AFFIRM**.

DISSENT

SUHRHEINRICH, Circuit Judge, dissenting. In general, a defendant asserting an ineffective assistance of counsel claim must demonstrate that counsel's performance was deficient and also that this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 2422 (1997). To show prejudice, the defendant must demonstrate that there is a reasonable probability that, absent counsel's unprofessional errors, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* The majority, like the district court below, acknowledges that Petitioner Rickman is unable to demonstrate actual prejudice resulting from Attorney Livingston's representation.

Nevertheless, relying principally upon dicta[1] from *United States v. Cronic*, 466 U.S. 648 (1984), the majority concludes that Rickman need not show prejudice in this case. Instead, the majority presumes prejudice and affirms the district court's grant of a writ of *habeas corpus*,

[1] The language in *Cronic* discussing the instances in which prejudice is presumed has been described as dicta by the First, Sixth, and Eleventh Circuits, *see Scarpa v. Dubois*, 38 F.3d 1, 12-15 (1st Cir. 1994); *Hammonds v. Newsome*, 816 F.2d 611, 613 (11th Cir. 1987); *Takacs v. Engle*, 768 F.2d 122, 124 (6th Cir. 1985), as well as by Judge Boggs in his dissenting opinion in *Green v. Arn*, 809 F.2d 1257, 1264 (6th Cir. 1987) (Boggs, J., dissenting).

which overturned the nearly twenty-year old conviction of an individual unquestionably guilty of a murder to which he voluntarily confessed and which was described by the Tennessee Supreme Court as "one of the most atrocious and inhuman conceivable." *State v. Groseclose*, 615 S.W.2d 142, 145 (Tenn. 1981). In my view, Rickman's case does not fall within the narrow exception discussed in dicta in *Cronic*. Applying the traditional test for prejudice articulated in *Strickland*, I conclude that Rickman's ineffective assistance of counsel claim must fail. I, therefore, respectfully dissent.

I.

In *Cronic*, the Supreme Court explained in dicta that certain circumstances are so likely to prejudice the accused that the cost of litigating their effect on a particular case is unjustified:

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.[25] Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

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[25]The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.

Cronic, 466 U.S. at 658-659 & n.25. The Court cautioned, however, that apart from circumstances of this magnitude, there generally exists no basis for finding a Sixth Amendment violation unless the defendant can show that counsel's specific errors undermined the reliability of the finding of guilt. *Id.* at 659 n. 26.

A.

Courts have been reluctant to apply the *Cronic* dicta broadly. *See, e.g., Scarpa v. Dubois*, 38 F.3d 1, 12-13 (1st Cir. 1994) (discussing cases refusing to apply *Cronic*); *Toomey v. Bunnell*, 898 F.2d 741, 744 n. 2 (9th Cir. 1990) ("We have applied the *Cronic* exception very sparingly.") This circuit applied *Cronic* in *Green v. Arn*, 809 F.2d 1257 (6th Cir. 1987), *vacated on other grounds*, 484 U.S. 806 (1987), reinstated, 839 F.2d 300 (1988) and *Martin v. Rose*, 744 F.2d 1245 (6th Cir. 1984). In *Green*, the defendant's counsel was absent during the cross-examination of a key government witness by an attorney for a co-defendant. Under these circumstances, we determined that there was prejudice per se, and a reversal of the defendant's conviction was warranted without inquiry into whether the constitutional violation resulted in harmless error. *Green*, 809 F.2d at 1263.

Judge Boggs dissented from the majority's holding to the extent it precluded the application of harmless error analysis. Judge Boggs would have upheld the defendant's conviction, because defense counsel's absence resulted in harmless error. *Id.* at 1264-65 (Boggs, J., dissenting). Judge Boggs rejected the majority's reliance on the dicta in

Cronic and its discussion of the denial of the right to counsel. He explained:

> The cases cited in *Cronic*, 466 U.S. at 668 . . . and those cited in support of *Cronic* in this opinion, all involve instances where something having to do with the truth-seeking process was prevented by court ruling, or where the part to be played in that process by defense counsel was wholly absent.
>
> Here, there is no hint or even speculation that what went into the record or the ears of the jury would have differed if the error had not occurred. Nor is this an instance where counsel's presence to object or take a strategic decision could have been crucial, nor where an opportunity has been irrevocably waived.

Id. at 1265 (Boggs, J., dissenting). Judge Boggs concluded: "[i]t elevates form over substance to equate what occurred here to the true denial of counsel cited in *Cronic*." *Id.*

I think that Judge Boggs had the better reading of the *Cronic* dicta. In any event, the majority opinion in *Green* provides no support for the present case. In *Green*, the majority opinion simply tracked the language of the *Cronic* dicta which "instructed that there is a 'constitutional error without any showing of prejudice when counsel was . . . totally absent . . . during a critical stage of the proceeding.' " *Id.* at 1262 (quoting *Cronic*, 466 U.S. at 668 n. 25). In addition, the decision in *Green* was a narrow one, as the majority cautioned that some absences by defense counsel might be "so de minimis" that they would not be constitutionally significant. *Id.* at 1261.

We also found prejudice per se in *Martin*, because defense counsel had "stood mute" during trial. Counsel's only participation was to make a brief statement to the jury explaining that the defendant would be relying on certain pretrial motions and that defense counsel would not be taking part in the trial. *Martin*, 744 F.2d at 1247. Counsel did not participate in jury selection, gave no other opening statement, did not cross-examine any of the government's witnesses, called no witnesses for the defense, and offered no closing argument. *Id.* Despite finding that the decision to remain silent was a strategic maneuver to which the defendant did not object, this circuit held that counsel's performance constituted ineffective assistance of counsel. We concluded that there was prejudice per se, since counsel's *total* lack of participation precluded the defendant from subjecting the government's case to " 'the crucible of meaningful adversarial testing.' " *Id.* at 1250 (quoting *Cronic*, 466 U.S. at 656).

Like *Green*, our decision in *Martin* lends no support to the majority's expansive reading of *Cronic* in the instant case. By refusing to participate at trial, counsel "entirely failed to subject the prosecution's case to meaningful adversarial testing. . . . " *Cronic*, 466 U.S. at 659; *see Martin*, 744 F.2d at 1250. The facts in Martin, therefore, fall within the language of the *Cronic* dicta.

B.

As support for its decision, the majority relies primarily upon two opinions from our sister circuits which contain overly expansive and, in my view, unwarranted interpretations of *Cronic*. I shall discuss each opinion in

turn. In *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991), the Ninth Circuit found prejudice per se where defense counsel conceded in his closing argument to the jury that there was no reasonable doubt as to his client's guilt regarding the only factual issues in dispute. The court concluded that the attorney's conduct had tainted the integrity of the trial. *Id.* The court held that the attorney had abandoned his duty of loyalty to his client and utterly failed to subject the government's case to meaningful adversarial testing. *Id.* at 1074-75.

Judge Wiggins dissented. In his view, defense counsel did the best that he could under the circumstances. *Id.* at 1080 (Wiggins, J., dissenting). Judge Wiggins explained:

> It is easy to condemn from our vantage point. We are not before the jury, empty handed, yet charged with the duty of providing an honest defense. We should, I believe, view counsel's performance less critically. He did not concede that his client was guilty. He did, however, admit that there was no reasonable doubt that one element of the government's case was true, namely, that the bank clerks were intimidated by the robber. Such an admission did not cause a collapse in the adversarial system, it did not taint the integrity of the trial, nor was it an abandonment by counsel of his client's defense. If it was error at all, it was not of the fundamental sort necessary to trigger the *Cronic* exception.

Id. Applying the traditional Strickland analysis, Judge Wiggins concluded that counsel's representation was not unconstitutional, because any errors made by defense counsel were not prejudicial. *Id.*

I agree with Judge Wiggins' dissenting opinion, because defense counsel's trial errors in *Swanson* were appropriate subjects for the traditional *Strickland* prejudice analysis. *See Childress v. Johnson*, 103 F.3d 1221, 1229 n. 12 (5th Cir. 1997) (same); *Scarpa*, 38 F.3d at 12-13 (same). The Supreme Court has stated: "Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. In addition, the Ninth Circuit's expansive interpretation in *Swanson* of the *Cronic* dicta is at odds with its own observation approximately one year earlier in *Toomey*, 898 F.2d at 744 n. 2, that "[w]e have applied the *Cronic* exception very sparingly."

Nevertheless, even if I were inclined to consider *Swanson* correctly decided, I would still find it inapplicable in the present case. *Swanson* can arguably be interpreted as falling within the *Cronic* dicta for the following reason: By conceding the lack of a reasonable doubt as to the only factual issues in dispute, defense counsel failed to subject the prosecution's case to the "crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656. As I shall discuss, Attorney Livingston's representation in the present case did not fall below that standard.

The majority also relies upon *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988). In *Osborn*, the defendant received the death penalty after pleading guilty to a series of crimes, including felony murder. The Tenth Circuit held that defense counsel was ineffective at both the guilty plea and sentencing stages. The court stated that defense counsel had "so abandoned" his duty to advocate

on behalf of his client "that the state proceedings were almost totally non-adversarial." *Id.* at 628. The court concluded that "[p]rejudice, whether necessary or not, is established under any applicable standard." *Id.* at 629. The *Osborn* court based its decision finding prejudice per se on the following facts: (1) when the defendant decided that he wanted to withdraw his guilty plea, defense counsel made statements to the press indicating that the defendant had no evidence to support his claims and that he was playing a game to attract attention; (2) defense counsel also made statements to the press during the sentencing stage which indicated that the defendant was not amenable to rehabilitation; (3) defense counsel knew or should have known that the prosecutor's office had conveyed ex parte information to the sentencing court, yet never sought to discover its contents or counteract its effects; (4) defense counsel stressed the brutality of the crimes at the sentencing hearing and referred to the difficulty incurred in presenting mitigating evidence when the evidence against a client is so overwhelming; and (5) defense counsel informed the trial judge in a letter written subsequent to his client's sentencing hearing that, in essence, counsel's client deserved the death sentence. *Id.* at 628-29. Although he was in the process at that time of arguing his client's appeal, counsel insisted that whether his statements helped his client " 'wasn't my concern.' " *Id.* at 629 (internal citation omitted).

In *Scarpa*, 38 F.3d at 12-13, the First Circuit rejected the *Osborn* court's application of the *Cronic* dicta. The First Circuit explained that the Supreme Court declined to accord presumptively prejudicial status to attorney errors particular to the facts of an individual case. *Id.* The

Scarpa court stated: "Virtually by definition, such errors 'cannot be classified according to likelihood of causing prejudice' or 'defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid.' *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067." *Id.* at 12.[2] The First Circuit also drew an analogy to the harmless error doctrine and the distinction between trial errors and structural errors. *See id.* at 14-15. Trial errors must be analyzed under the particular circumstances of each case in order to determine whether actual prejudice, in fact, resulted. *Id.* at 14. Structural errors, on the other hand, "jar the framework in which the trial proceeds." *Id.* Thus, "structural errors so undermine confidence in the fairness and reliability of the proceedings that prejudice is presumed." *Childress*, 103 F.3d at 1230 (discussing *Scarpa*); *see Scarpa*, 38 F.3d at 14. The *Scarpa* court explained: "The 'common thread' connecting the numerous examples of trial error listed . . . in Fulminante is that all such errors occur 'during the presentation of the case to the jury,' and therefore may be 'quantitatively assessed in the context of [the] evidence presented' in order to gauge harmlessness." *Scarpa*, 38 F.3d at 14 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991)).

I find the *Scarpa* court's analysis persuasive and agree that defense counsel's errors in *Osborn* were amenable to the Strickland analysis. However, even if I were to follow *Osborn*, I would still find it distinguishable from

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[2] The First Circuit distinguished our decision in *Green* to presume prejudice because defense counsel was *absent* from the courtroom during a critical stage of the trial. *See Scarpa v. Dubois*, 38 F.3d 1, 12 (1st Cir. 1994).

the present case. *Osborn* dealt with an extreme situation where defense counsel abandons his client and "effectively joins the state in an effort to attain a conviction or death sentence. . . . " *Osborn*, 861 F.2d at 629; *cf. Davis v. Executive Director of Dep't of Corrections*, 100 F.3d 750, 759 (10th Cir. 1996) (refusing to apply Osborn where defense counsel described the case as "one of the worst ones I have ever seen" and expressed his hatred for the defendant), *cert. denied*, 117 S.Ct. 1703 (1997). As I shall discuss, Attorney Livingston did not "join" with the prosecution in the present case to obtain either Rickman's conviction or his death sentence. Attorney Livingston initially attempted, with Rickman's approval, to obtain a plea bargain for his client. After this failed and Rickman was tried and convicted, Attorney Livingston spent nearly three hours arguing to the jury to spare Rickman's life.

II.

A principal reason given by the Supreme Court for the presumption of prejudice in certain instances was the desire to avoid the cost involved in case-by-case inquiries. *See Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 658. Both Swanson and Osborn, as well as the majority opinion in the present case, frustrate this objective. Once it is necessary for a court to examine the trial record in order to evaluate counsel's particular errors, the resort to a per se presumption can no longer be justified by the goal of avoiding case-by-case litigation. Thus, "[a]n overly generous reading of *Cronic* would do little more than replace case-by-case litigation over prejudice with case-by-case litigation over prejudice per se." *Scarpa*, 38 F.3d at 14. The majority in the present case is a perfect

example. First, it spends sufficient time examining the record to allow it to conclude that Rickman could not prevail if he were required to show actual prejudice. The majority rejects Rickman's argument that there exists a reasonable probability that he would not have been convicted of first degree murder had Attorney Livingston investigated and presented a defense of lack of *mens rea*. It then undertakes a second review of the record, highlighting the particular conduct of Attorney Livingston which, in the majority's view, justifies the application of *Cronic*. In doing so, the majority frustrates a principal policy underlying the *Cronic* dicta.[3]

An unnecessarily expansive reading of the *Cronic* dicta frustrates other substantial interests as well; i.e., comity, federalism, and the finality of judgments. In *Engle v. Isaac*, 456 U.S. 107, 128 (1982), the Supreme Court observed that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." Likewise, in *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), *superseded on other grounds by statute*, 28 U.S.C.A. § 2253(c)(2) (West Supp. 1997), the Court explained:

> [I]t must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review . . . comes to an end, a presumption of finality and

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[3] In *Cronic*, 466 U.S. at 658, the Supreme Court stated: "There are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."

> legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely.

III.

The majority has recounted the elements of Attorney Livingston's representation which it believes warrant the application of the *Cronic* dicta in this case, and I need not repeat them here. I do not condone Attorney Livingston's performance, but that is not the issue. As the Supreme Court declared in *Cronic*, 466 U.S. at 665 n. 38: "We address not what is prudent or appropriate, but only what is constitutionally compelled." In *Cronic*, the Supreme Court explained that the Sixth Amendment is generally not implicated absent an effect on the reliability of the trial process. *Id.* at 658. The Court pointed out that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Id.* I am satisfied that Attorney Livingston did not breach his duty of loyalty to Rickman, create a conflict of interest with his representation, or *entirely* fail to subject the prosecution's case to meaningful adversarial testing, such that the trial's outcome was presumptively unreliable. *See Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 658-59.

The majority finds that Attorney Livingston's representation amounted to a constructive denial of the assistance of counsel. However, the instant case is unlike either of the two examples of constructive denial discussed in *Cronic*. *See Woodard v. Collins*, 898 F.2d 1027, 1028-29 (5th Cir. 1990). First, the Supreme Court has consistently found constitutional error without any showing of prejudice where counsel was totally absent or prevented from assisting the defendant during a critical stage of the proceeding. *Cronic*, 466 U.S. at 659 n. 25. Neither situation occurred here. Second, Attorney Livingston did not *entirely* fail to subject the prosecution's case to meaningful adversarial testing. *Id.* at 659.

At the beginning of his representation, Attorney Livingston received a copy of a nine-page confession given by Rickman to the Shelby County District Attorney's Office. Attorney Livingston testified at Rickman's post-conviction relief hearing that he went to the Shelby County jail and left the confession with Rickman to review. One week later, Attorney Livingston visited Rickman again. With respect to this meeting, Attorney Livingston testified:

> A: I went back and asked him what part was true and what part was false.
>
> Q: And he told you that it was true?
>
> A: He said, "It's all true."
>
> Q: But you didn't discuss with him the contents of the statement and the implications of it, did you?
>
> A: I went over the statement with him word for word. . . . He knew what was in it and I

> knew what was in it. I asked him if he had been advised of his *Miranda* rights and he said that he had. I asked him had he been forced or coerced in any way to give a statement and he said that the police had been nothing but exceptionally good to him.

J.A. at 838.

After Rickman informed him that the confession was accurate, Attorney Livingston determined that he would attempt to persuade the District Attorney to permit Rickman to enter a plea of guilty, accept a life sentence, and thereby avoid Tennessee's electric chair. *Id.* at 836. The District Attorney initially refused to accept the plea but eventually agreed on the condition that Rickman, Groseclose, and Britt would all plead guilty and accept life sentences. Attorney Livingston testified that the plea was acceptable to Rickman and Britt but not to Groseclose. As a result, the case proceeded to trial where Attorney Livingston attempted "to persuade the jury that Rickman was 'abnormal and should not be judged as a normal person,'. . . . and 'to show the jury that we had a sick boy on trial, a subnormal, abnormal human being on trial. . . . That was my whole object of the whole defense, was try to convince the jury that we had a sick man on trial.' " *Rickman v. Dutton*, 864 F. Supp. 686, 694 (M.D.Tenn. 1994) (internal citations omitted). After Rickman was convicted of first degree murder, Livingston argued for approximately three hours during the sentencing stage in an attempt to convince the jury to spare Rickman from the electric chair.

The district court found that Attorney Livingston devoted sixteen hours to pre-trial preparation. *Id.* Attorney Livingston testified that he explained to Rickman the elements of first degree murder in Tennessee and the punishment for a conviction. Attorney Livingston reviewed the statements incriminating Rickman which Britt and Mount had given following their arrests. Notwithstanding Rickman's statement that his confession was voluntary, Attorney Livingston filed a pre-trial motion to suppress Rickman's confession. Attorney Livingston also filed a motion to sever Rickman's case from those of his co-defendants. Both motions were denied. Moreover, Attorney Livingston requested a psychiatric evaluation with respect to whether Rickman was competent to stand trial. The psychiatrist who examined Rickman determined that he was, in fact, competent.

From the moment Attorney Livingston learned that Rickman's nine-page confession was accurate and lawfully obtained, Attorney Livingston's sole purpose was to persuade the District Attorney to accept a guilty plea and life sentence for Rickman, thus sparing him from Tennessee's electric chair. After the plea bargain failed, Attorney Livingston testified that he attempted to portray Rickman to the jury as an abnormal human being. Attorney Livingston's tactics must be understood precisely for what they were; i.e., a last ditch attempt to persuade the jury to spare Rickman from the electric chair. These are certainly not the actions of a defense counsel who was allegedly so hostile to his client's interests that he functioned as a "second prosecutor." Maj. op. at p. 1157.

In *Strickland,* the Supreme Court cautioned that courts must review the performance of an attorney with a

"heavy measure of deference," *Strickland*, 466 U.S. at 691, and make every effort "to eliminate the distorting effects of hindsight," *id.* at 690. In addition, the Court explained that the reasonableness of an attorney's actions may be determined or substantially influenced by the defendant's own statements or actions. *Id.* at 691. In the instant case, Attorney Livingston was representing a defendant on trial for one of the most atrocious murders imaginable. Attorney Livingston had been informed by Rickman that the nine-page confession he provided to the District Attorney detailing the murder was completely voluntary and entirely accurate. Moreover, Attorney Livingston had read the incriminating statements provided to the District Attorney by Britt and Mount. Under these circumstances, I do not find that Attorney Livingston's representation amounted to a breach of his duty of loyalty to Rickman or that Attorney Livingston *entirely* failed to subject the prosecution's case to meaningful adversarial testing. We should recall Clarence Darrow's famous statements in defense of Nathan Leopold, Jr. and Richard Loeb, who faced the death penalty after they pled guilty to the kidnap and murder of a fourteen-year-old boy: "I do not know how much salvage there is in these boys. I hate to say it in their presence, but what is there to look forward to? I do not know but that Your Honor would be merciful if you tied a rope around their necks and let them die. . . ." *Attorney for the Damned* 84 (Arthur Weinberg ed., 1957). Although Attorney Livingston's representation certainly did not equal that of Clarence Darrow, it nonetheless satisfied the minimum standard required by the Constitution.

IV.

Since I agree with the majority, as well as the district court, that Rickman is unable to show that his defense was actually prejudiced by Attorney Livingston's representation, I would reject Rickman's ineffective assistance of counsel claim. From the majority's holding to the contrary, I respectfully dissent.

Ronald Eugene RICKMAN

v.

Michael DUTTON, Warden, Riverbend Maximum Security Institution.

No. 3:85-0256.

United States District Court,
M.D. Tennessee,
Nashville Division.

Sept. 2, 1994.

Henry A. Martin, William P. Redick, Paul R. Bottei, Nashville, TN, for petitioner.

Glenn R. Pruden, C. Mark Fowler, Nashville, TN, for respondent.

MEMORANDUM

JOHN T. NIXON, Chief Judge.

In this habeas corpus proceeding under 28 U.S.C. § 2254, Petitioner Ronald Eugene Rickman challenges the constitutionality of his 1978 conviction and death sentence imposed by the Criminal Court of Shelby County, Tennessee. Commencing May 3, 1994, the Court conducted a limited evidentiary hearing on Rickman's claims challenging only the constitutionality of his conviction for first-degree murder. Upon the evidence presented and argument of counsel, the Court makes the following Findings of Fact and Conclusions of Law, in accordance with Fed.R.Civ.P. 52(a).

I. FINDINGS OF FACT

A. *Procedural History*

1. In June, 1977, William Edward Groseclose hired Petitioner Ronald Eugene Rickman and Phillip Michael Britt to murder his wife, Deborah Lee Groseclose. On July 4, 1977, Mrs. Groseclose was found murdered in the trunk of her automobile. After a trial in the Criminal Court of Shelby County, Tennessee, in February, 1978, Rickman was convicted of first-degree murder for his role in the death of Mrs. Groseclose.[1] Rickman was sentenced to death at the conclusion of a sentencing hearing held between March 1 and March 3, 1978.

2. The Tennessee Supreme Court affirmed Rickman's conviction and sentence on February 17, 1981. *State v. Groseclose & Rickman*, 615 S.W.2d 142, 150 (Tenn.1981). The Tennessee Supreme Court affirmed Groseclose's conviction and sentence in the same proceeding. *Id.* On February 27, 1981, the Tennessee Supreme Court denied a petition for rehearing. *Id.* at 142. On October 5, 1981, the United States Supreme Court denied Rickman and Groseclose's respective petitions for a writ of certiorari. *Groseclose v. Tennessee*, 454 U.S. 882, 102 S.Ct. 366, 70 L.Ed.2d 193 (1981); *Rickman v. Tennessee*, 454 U.S. 882, 102 S.Ct. 367, 70 L.Ed.2d 193 (1981).

3. Rickman and Groseclose filed petitions for post-conviction relief in the Criminal Court of Shelby County,

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[1] Rickman's co-defendants, William Edward Groseclose and Phillip Michael Britt, were also tried and convicted of first-degree murder. Groseclose was sentenced to death, and Britt was sentenced to life imprisonment.

Tennessee. The trial court conducted an evidentiary hearing on March 25-26, 1982, and denied their petitions on December 5, 1982. On February 16, 1984, the Court of Criminal Appeals affirmed the trial court's judgment. Rickman and Groseclose then each filed petitions for rehearing. The Court of Criminal Appeals denied Groseclose's petition on March 2, 1984, and denied Rickman's petition on March 12, 1984. On July 2, 1984, the Tennessee Supreme Court denied Rickman and Groseclose's applications for permission to appeal. On October 29, 1984, the United States Supreme Court denied Rickman's petition for a writ of certiorari. *Rickman v. Tennessee*, 469 U.S. 963, 105 S.Ct. 363, 83 L.Ed.2d 299 (1984). The United States Supreme Court denied Groseclose's petition for a writ of certiorari on November 26, 1984. *Groseclose v. Tennessee*, 469 U.S. 1066, 105 S.Ct. 549, 83 L.Ed.2d 436 (1984).

4. Rickman filed the instant petition for writ of habeas corpus under 28 U.S.C. § 2254 on March 5, 1985, challenging the legality of his confinement and death sentence. (Pet. Habeas Corpus, Doc. No. 5.) By Order entered on March 5, 1985, this Court granted a stay of execution of Rickman's death sentence. (Ord., Doc. No. 8.) The State filed its answer on September 27, 1985. (Answer, Doc. No. 31.) On May 25, 1989, the Court transferred this action to the Western District of Tennessee. (Ord., Doc. No. 48) After ordering the file returned by Order entered on November 21, 1989 (Doc. No. 56), the Court vacated its order to transfer this action.

5. On June 28, 1989, Rickman filed a second petition for post-conviction relief in the Criminal Court of Shelby County, Tennessee. The trial court dismissed Rickman's

second petition for post-conviction relief on February 20, 1990. The Court of Criminal Appeals affirmed the trial court's decision on September 11, 1991. On October 4, 1991, the Court of Criminal Appeals denied Rickman's petition for rehearing, filed September 23, 1991. On February 24, 1992, the Tennessee Supreme Court denied Rickman's application for permission to appeal, filed October 30, 1991.

6. On July 23, 1990, Rickman filed a motion to amend his petition for writ of habeas corpus. (Mot. Am. Pet. Habeas Corpus, Doc. No. 66.) The Court granted the motion on September 14, 1992. (Am. Pet., Doc. No. 89A.) The State filed an answer to the amended petition on September 24, 1992. (Am. Answer, Doc. No. 90.) On November 5, 1992, this action was referred to the Magistrate Judge for case management.

7. Rickman filed a second motion to amend his petition for writ of habeas corpus on November 23, 1992. (Mot. Am. Pet. Habeas Corpus, Doc. No. 106.) On February 26, 1993, the State filed an answer to Rickman's second amended petition. (Second Am. Answer, Doc. No. 121.) The Court granted Rickman's second motion to amend petition on March 5, 1993. (Second Am. Pet., Doc. No. 128A.) On May 20, 1993, the State filed a motion for writ of mandamus in the United States Court of Appeals for the Sixth Circuit, which the Sixth Circuit granted on November 9, 1993.

8. Pursuant to a scheduling order entered on January 4, 1994 (Doc. No. 169), Rickman filed an amendment to his petition for writ of habeas corpus on January 20, 1994. (Third. Am. Pet., Doc. No. 174.) On January 31,

1994, the State filed an answer to Rickman's third amended petition for writ of habeas corpus. (Third Am. Answer, Doc. No. 185.)

9. On March 10, 1994, Rickman filed a motion for partial summary judgment. (Pet'r Mot. Partial Summ.J., Doc. No. 211.) The State filed a response to Rickman's motion for summary judgment and a cross-motion for partial summary judgment on March 23, 1994. (Resp't Resp. Mot. Partial Summ. J., Doc. No. 224.) On April 1, 1994, Rickman filed a reply to the State's response to Petitioner's motion for summary judgment (Doc. No. 236), and a motion to strike the State's cross-motion for summary judgment (Doc. No. 235).

10. On April 11, 1994, the Court heard oral argument from the parties on Rickman's motion for partial summary judgment. By Memorandum and Order entered on April 24, 1994 (Doc. Nos. 270, 271), the Court granted Rickman's motion for summary judgment on the claim that his death sentence was unconstitutional because the jury had considered and weighed a vague "heinousness" aggravating circumstance in rendering Rickman's sentence. By Order entered on April 25, 1994, the Court certified its April 24, 1994 decision as appealable under Fed.R.Civ.P. 54(b) and reserved its ruling with respect to all other sentencing issues. (Ord., Doc. No. 272.)

11. Rickman now challenges the constitutionality of his conviction for first-degree murder on the basis of the following claims:

(1) Rickman was denied the effective assistance of counsel at the guilt phase of trial because counsel presented no defense to

the charges against Rickman, in violation of the Sixth, Eighth, and Fourteenth Amendments;

(2) Rickman was denied due process and a fair trial because: (a) the prosecution presented the false and misleading testimony of Barton Wayne Mount concerning the nature of Mount's relationship with the prosecution and his agreements and expectations concerning favorable treatment; and (b) the prosecution withheld material evidence concerning the false and misleading nature of Mount's testimony, in violation of the Sixth, Eighth, and Fourteenth Amendments;

(3) The jury rendered an unconstitutional verdict because the jury was provided with a constitutionally infirm instruction on "reasonable doubt" in violation of the Sixth, Eighth, and Fourteenth Amendments;

(4) Rickman's confession was extracted in violation of *Miranda* and his Fifth and Sixth Amendment rights to counsel and right to remain silent;

(5) The prosecution improperly introduced a grenade detonator at trial which was unduly inflammatory, which was not properly admitted into evidence, and which permitted the jury to base a determination of guilt upon extraneous evidence for which Rickman was not on trial, in violation of the Sixth, Eighth, and Fourteenth Amendments;

(6) Rickman was unconstitutionally administered medication which affected his

demeanor and ability to assist with his defense, in violation of the Sixth, Eighth, and Fourteenth Amendments;

(7) Rickman was denied his right to a fair jury trial and due process because the jury viewed him in handcuffs and shackles, in violation of the Sixth, Eighth, and Fourteenth Amendments;

(8) Rickman was denied his rights to confrontation, cross examination, and assistance of counsel because, during the jury selection process, the jury was contaminated by the outside influence of statements and comments by prospective jurors who had already been questioned and dismissed from service, in violation of the Sixth, Eighth, and Fourteenth Amendments;

(9) Rickman was denied the effective assistance of counsel for any alleged failure to properly raise any of the issues alleged in his habeas corpus petition at an earlier point in the proceedings, in violation of the Sixth, Eighth, and Fourteenth Amendments;

(10) Rickman was denied due process at the guilt phase of his trial due to the cumulative effect of the errors alleged, in violation of the Eighth and Fourteenth Amendments.

(Second Am. Pet., Doc. No. 128A, at 14-32, 35-37, 44-45, 50-54, 58-60, 66-67; Third Am. Pet., Doc. No. 174, at 1-2; Pretrial Ord., at 3-6.)

12. On May 3, 5, and 10, 1994, the Court conducted a limited evidentiary hearing on Rickman's claims challenging the constitutionality of his conviction for first-degree murder.

B. *Facts Relevant To Claims*[2]

(1)

1. Rickman's trial counsel, Robert I. Livingston, testified that after being assigned Rickman's case, he interviewed Rickman and asked him if a statement he had given to the authorities was "true." (1 E.H. Tr. 29-30.) When Rickman responded that the statement was true, Livingston assumed that there was no defense and conducted no further investigation. (*Id.* at 29-31.) Livingston spent a total of sixteen hours preparing for Rickman's

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[2] Citations to the record are made as follows:

Voir dire Tr. ___	(State Trial Voir Dire Transcript, Page)
Trial Tr. ___	(State Trial Transcript, Page)
Closing Arg. Tr. ___	(State Trial Closing Argument, Page)
Tech. Rec. ___	(State Trial Technical Record, Page)
P.C. Tr. ___	(State Post-Conviction Transcript, Page)
___ P.C. Ex. ___	(State Post-Conviction Exhibit, Page)
Doc. No. ___	(Federal Court Document Docket Number)
___ E.H. Tr. ___	(Volume, Federal Evidentiary Hearing Transcript, Page)
___ E.H. Ex. ___	(Party, Federal Evidentiary Hearing Exhibit, Number)

trial. (Pet'r E.H. Ex. 33.) Livingston's preparation consisted solely of interviews he conducted with Rickman. (*Id.*)

2. Livingston devoted his efforts to getting the State to agree to allow Rickman to enter a plea of guilty and accept a life sentence. (*Id.* at 30.) Livingston acknowledged that he only presented a defense at the sentencing phase of trial. (1 E.H. Tr. 54.) Livingston called no witnesses and made no argument to the jury at the guilt phase.

3. Livingston's defense strategy at the guilt phase was simply to persuade the jury that his client was "abnormal and should not be judged as a normal person," (1 E.H. Tr. 50; Pet'r E.H. Ex. 34), and "to show the jury that we had a sick boy on trial, a subnormal, abnormal human being on trial. . . . That was my [sic] whole object of the whole defense, was try to convince the jury that we had a sick man on trial." (P.C. Tr. 102.) At trial, Livingston elicited testimony from numerous witnesses that Rickman looked dangerous and wild-eyed, that he did not look like a normal, average all-American boy, and that he had planned the crime "to the nth degree." (Trial Tr. 329, 846, 849-50, 942-44, 960, 987-88, 1042-44, 1074-75.)

4. The jury found Rickman guilty of wilful, premeditated, and deliberate murder.

5. At the federal evidentiary hearing commencing May 3, 1994, Dr. Gillian Blair described Rickman's social history and the results of psychological testing and interviews she conducted with Rickman. (2 E.H. Tr. 80-94.) Dr. Blair testified that Rickman is a tenuous and fragmented social misfit, with low self-esteem and deep-seated feelings of inferiority. (*Id.* at 51-74.) Dr. Blair stated her

opinion that Rickman was sane at the time of the crime. (*Id.* at 139.) However, she concluded as well that Rickman's psychological profile is not that of a cold-blooded killer. (*Id.* at 159-60.) Dr. Blair stated that Rickman needed to impress those around him as a "tough guy" by making plans about which he was actually ambivalent to carry out. (*Id.* at 158-60.)

(2)

6. On September 13, 1977, Mount, Groseclose, Britt, and Rickman were indicted for first-degree murder by the Shelby County Grand Jury. Prior to trial, Mount's attorneys, James Galloway and Richard Vaughn, sought to settle Mount's case with the Shelby County District Attorney's Office. (2 E.H. Tr. 181.) Mount's attorneys believed that it would be to Mount's benefit to testify against his co-defendants. (*Id.* at 183.) Vaughn knew that Mount and the other co-defendants were going to be tried jointly, and he wanted to avoid a trial. (*Id.* at 182.) Vaughn believed that it would be a bad case to take to trial, and that Mount would likely be convicted of first-degree murder if he was tried with his co-defendants. (*Id.*)

7. Upon Galloway's request, Shelby County District Attorney General Hugh Stanton met with Galloway and Vaughn to discuss having Mount cooperate with the State and testify against the other co-defendants. (2 E.H. Tr. 21, 181.) During his sixteen-year tenure as District Attorney General, General Stanton tried only three cases, while settling hundreds of others. (*Id.* at 9-10.) When settling cases through plea agreement, General Stanton was aware that defense attorneys approached him seeking

settlement in order to promote the best interests of their clients. (*Id.* at 16.) General Stanton believed that Mount was cooperating in order to get the best possible offer from the State. (*Id.* at 26.)

8. Because he agreed to cooperate with the State, Mount was transferred from the Shelby County Jail to the Memphis Correctional Center (MCC) on December 5, 1977. (2 E.H. Tr. 21, 22, 24.) One of the conditions of Mount's incarceration at MCC was that he was permitted to visit with his parents. (Pet'r E.H. Ex. 3.) Although General Stanton did not seek severance of co-defendants if to do so would merely multiply the number of trials on a particular offense, it had also been agreed that Mount's case would be severed. (Pet'r E.H. Ex. 19[3]; 2 E.H. Tr. 16-17, 19, 27.)

9. General Stanton first met with Mount at the MCC on December 5, 1977. (2 E.H. Tr. 24.) During that meeting, General Stanton took a statement from Mount, in the presence of Mount's attorneys, in preparation for examining Mount at the trial of his co-defendants. (*Id.* at 24-25.) All of the parties understood that General Stanton was taking Mount's statement to prepare for trial and not to be used against Mount. (*Id.* at 26.) By that time, General Stanton fully intended not to seek the death penalty against Mount. (*Id.* at 27.) Moreover, prior to Rickman's

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[3] Exhibit 19 contains notes dated October 12, 1978, from the Shelby County District Attorney General's Office about *State v. Levi Williams & Timothy Horton*, Attorney General File No. E6897. The notes reflect that, upon reviewing the facts in the case, the Attorney General's Office would not sever the codefendants.

trial, General Stanton decided that he would not seek a first-degree murder conviction against Mount, and would allow him to plead guilty to second degree murder. (*Id.* at 28.)

10. When a co-defendant agreed to testify against his other co-defendants, General Stanton did not normally make an official offer of settlement to the witness prior to the witness testifying. (2 E.H. Tr. 18-19.) The purpose behind withholding a final offer was to prevent the witness from being impeached while testifying due to the existence of the offer. (*Id.*)

11. Mount and his attorneys believed that Mount's cooperation would work to his benefit, and they did not seek immunity for any of Mount's statements or for Mount's trial testimony. (2 E.H. Tr. 184.) Mount's attorneys counseled Mount about the advantages of testifying for the State. (*Id.* at 184-85.) On December 6, 1977, Galloway sent Mount's telephone bill to Assistant Attorney General Jewitt Miller. (Pet'r E.H. Ex. 2.) On December 7, 1977, Galloway contacted the Warden at the MCC to discuss the agreed-upon conditions of Mount's incarceration. (Pet'r E.H. Ex. 3.)

12. On December 9, 1977, Rickman filed a motion seeking disclosure of any agreement or understanding between the State and its witnesses "that could conceivably influence said witnesses' testimony." (Tech. Rec. 43.) The State responded that "the defendant has no right to any such information." (Tech. Rec. 74.)

13. On February 6, 1978, General Stanton met with and took another statement from Mount, fully intending not to use it against him. (Pet'r E.H. Ex. 11; 2 E.H. Tr.

30-32.) Although severance had been agreed upon months earlier, Mount finally filed his motion for severance on February 13, 1978, the day that trial began. (2 E.H. Tr. 190.) Mount's trial was officially severed on February 14, 1978. (Pet'r E.H. Ex. 37.) Mount then testified against the other defendants as a witness for the prosecution. While testifying, Mount stated that he had not received any consideration from the prosecution, and that he did not expect any consideration. (Trial Tr. 266-69.) He professed that there had not been any "deal to deal," and that he could still receive the death penalty. (*Id.* 268, 269.)

14. After Rickman's conviction, nothing happened in Mount's case for several months. On October 16, 1978, the Shelby County Criminal Court denied Rickman's motion for a new trial. On October 23, 1978, the court set Mount's case for disposition on November 27, 1978. (Pet'r E.H. Ex. 37.) On November 14, 1978, the District Attorney General offered Mount a 10-year sentence in exchange for a guilty plea to second degree murder. (2 E.H. Tr. 33.) On November 27, 1978, Mount entered a plea of guilty to second degree murder. (*Id.* at 186.)

15. General Stanton continued to reward Mount for his cooperation after Mount was incarcerated. On March 17, 1980, General Stanton wrote a letter to the Warden of MCC in which he recommended that Mount be reclassified to minimum security status, and stated that Mount had been "as cooperative as one could be in the trial of the case. . . . " (Pet'r E.H. Ex. 5.) On August 27, 1980, the MCC Reclassification Review Committee recommended that Mount be reclassified to minimum security status. (Pet'r E.H. Ex. 7.) Mount thanked General Stanton

for Stanton's efforts on his behalf by letter dated September 3, 1980. (Pet'r E.H. Ex. 8.)

16. When Mount appeared before the Tennessee Parole Board, Mount's attorney argued that Mount should be paroled because Mount had cooperated with the State from the start, and that Mount's testimony had been vital to the State's case against Rickman. (2 E.H. Tr. 189.) Mount was paroled on May 23, 1982. (Pet'r E.H. Ex. 20, at 4.) On August 23, 1982, Mount was completely released from parole supervision. (*Id.*)

(3)

17. At the guilt phase of his trial, Rickman's jury was given the following "reasonable doubt" instruction:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

(Trial Tr. 2422.)

(4)

18. On July 12, 1977, Rickman was arrested in Tulsa, Oklahoma. Rickman was interrogated in Tulsa on July 13, 1977, by Tulsa Police Officer Daverne ("D.A.") Roberts,

and Memphis Police Officers Kenneth East and William Hylander. At 9:49 AM on that same day, Rickman gave a formal statement to Roberts, East, and Hylander, implicating himself in the death of Deborah Groseclose.

19. At trial, Rickman denied that he waived his *Miranda* rights knowingly and voluntarily, and maintained that he gave the statement only after his repeated requests for counsel were ignored. The trial court conducted a hearing, "resolve[d] the credibility in the favor of the State," and admitted the statement into evidence. (Trial Tr. 1571-73.)

(5)

20. At trial, the State introduced evidence of a grenade detonator that allegedly belonged to Rickman. (Trial Tr. 678-79.) Rickman objected to the admission of the grenade detonator evidence, but his objection was overruled by the trial court.

(6)

21. Although neither Rickman nor Groseclose requested any assistance in sleeping, jail officials took them to see Dr. Wender, a psychiatrist, prior to trial. (P.C. Tr. 233.) Dr. Wender informed Rickman and Groseclose that he was going to give them Dalmane, a sedative. (*Id.*) On February 17, 1978, the day before Rickman and Groseclose's joint trial commenced, the State began administering Dalmane to Rickman and Groseclose, each at a dosage of 30 milligrams per day. (*Id.* at 183, 186, 308.)

The State began administering the depressant Meprobamate to Groseclose on February 22, a few days into the trial. (*Id.* at 183.) The State began administering Meprobamate to Rickman on the following day. (*Id.* at 186; Pet'r P.C. Ex. 6.) Both Rickman and Groseclose received the maximum allowable dosage of 1600 milligrams per day. (P.C. Tr. 183, 186, 301.) Rickman and Groseclose remained on the same dosages of Dalmane and Meprobamate throughout the trial. On March 7, a few days after the trial ended, the State began reducing the Meprobamate dosage given to both Rickman and Groseclose to 1200 milligrams each per day. (*Id.* at 184, 187; Pet'r P.C. Ex. 6.)

22. At the State post-conviction hearing, Dr. Ramirez, Director of Alcohol and Drug Abuse at the Memphis Mental Health Institute, testified that Meprobamate is an "anti-anxiety" drug. (P.C. Tr. 301-02, 324.) Drowsiness is one of the side effects of Meprobamate. (*Id.* at 302, 303.) An individual who takes the maximum dosage of 1600 milligrams per day generally exhibits slower speech and coordination, and may act as if he were intoxicated. (*Id.* at 334-36.) Meprobamate can cause addiction, as well as physical and psychological dependency. (*Id.* at 304.) Dalmane, which is used to treat insomnia and induce sleep, has similar physical and physiological effects. (*Id.* at 308, 323.) When Dalmane is used in combination with Meprobamate, the two drugs together have a much more powerful effect on the central nervous system than either drug has separately. (*Id.* at 308-09.)

23. Dr. Ramirez confirmed that a person given a combination of Meprobamate and Dalmane would be slower and less responsive to his environment. (P.C. Tr. at 315, 330.) Although Dr. Ramirez testified that both a

psychological and a physical examination would be required in every case before either Dalmane or Meprobamate was administered, neither Rickman nor Groseclose received either type of examination. (*Id.* at 311-16.)

24. Groseclose reported that he struggled to remain awake at trial, and Rickman indicated that he did not fully remember the events of the trial due to the medication. (*Id.* 43-44, 234-35.)

(7)

25. During a recess in the testimony of girlfriend, Pamela Baker Lindsey, Rickman was returned to court in handcuffs. (Trial Tr. 798-808.) After Lindsey began testifying for a matter of time which is reflected in ten pages of the trial transcript, see Trial Tr. 798-808, Rickman released an "audible groan" which was recorded in the transcript by the court reporter. (*Id.* at 808.) At that point, Rickman's attorney stated, "Judge, my client's sitting over there with handcuffs on." (*Id.*) Judge Lafferty responded that he had not known that Rickman had been handcuffed, and ordered the handcuffs removed. (*Id.* at 809.) The bailiff removed the handcuffs, and Rickman's attorney continued cross-examining Lindsey. (*Id.*)

(8)

26. While several prospective jurors waited in the jury room to be called for voir dire, they overheard statements about the case made by individuals who were returning to the jury room after they had been questioned on voir dire. Although one prospective juror overheard

comments regarding Rickman's guilt or innocence, she stated under oath that the comments she overheard would not affect her verdict and that she could be fair and impartial. (*Voir dire* Tr. 1054-55.) She ultimately did not serve on Rickman's jury. The other prospective jurors who overheard comments reported that the comments they overheard were related only to whether the individuals speaking "had been over there" for voir dire and whether they had been excused from the jury. (*Id.* at 1051-58.)

II. CONCLUSIONS OF LAW

As a preliminary matter, the factual findings of the State courts are entitled to a presumption of correctness under 28 U.S.C. § 2254(d) unless any one of several statutory exceptions to the general presumption exists[4],

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[4] The presumption of correctness does not apply if a petitioner demonstrates, or a state admits, the existence of one or more of the following circumstances:

(1) that the merits of the factual dispute were not resolved in the state court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was indigent and the State court, in deprivation of his constitutional right,

or a petitioner establishes by convincing evidence that the State court factual findings are erroneous. *See Sumner v. Mata*, 455 U.S. 591, 597-98, 102 S.Ct. 1303, 1307, 71 L.Ed.2d 480 (1982). This presumption of correctness only applies, however, to basic, primary, or historical facts, and not to mixed questions of law and fact. *Levine v. Torvik*, 986 F.2d 1506, 1514 (6th Cir.1993), *cert. denied*, 509 U.S. 907, 113 S.Ct. 3001, 125 L.Ed.2d 694 (1993).

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failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding on which the determination of such factual issues was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record. . . .

28 U.S.C. § 2254(d).

A. *Claim 1: Ineffective Assistance Of Counsel*[5]

A criminal defendant has a Sixth Amendment right to receive effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). The standard for establishing "cause" as a result of ineffective assistance of counsel is two-pronged: (1) whether counsel was deficient in representing the defendant; and (2) whether counsel's alleged deficiency prejudiced the defense so as to deprive the defendant of a fair trial. *Id.* at 687, 104 S.Ct. at 2064. To meet the first prong, a petitioner must establish that his attorney's representation "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. at 2064. Mere attorney ignorance or inadvertence will not constitute "cause" unless the error rises to the level of a constitutional violation. *See Coleman v. Thompson*, 501 U.S. 722, 751-55, 111 S.Ct. 2546, 2566-67, 115 L.Ed.2d 640 (1991). The "prejudice" component of the claim "focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. ___, ___, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993).

In assessing counsel's performance, a reviewing court must be highly deferential. *Strickland*, 466 U.S. at

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[5] Although Rickman also asserts that he was denied the effective assistance of counsel at sentencing, the Court only addresses his claim alleging ineffective assistance of counsel at the guilt phase of trial. Rickman has reserved this and other sentencing phase issues for hearing and resolution at some later point, should a determination on any unresolved sentencing phase issues become necessary.

689, 104 S.Ct. at 2065. The court must determine whether under the circumstances counsel's allegedly unreasonable acts or omissions "were outside the wide range of professionally competent assistance." *Id.* at 690, 104 S.Ct. at 2066. While strategic choices made after thorough investigation are generally considered within the range of competent assistance, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S.Ct. at 2066. *See also Martin v. Rose*, 717 F.2d 295 (6th Cir.1983) (counsel ineffective where failed to interview alibi witnesses and unaware of investigative file prepared by public defender); *United States v. Goodwin*, 531 F.2d 347 (6th Cir.1976) (counsel ineffective where misunderstood elements of offense and examined client at preliminary hearing in such a manner that client inadvertently confessed).

Rickman asserts that he was denied the effective assistance of counsel at the guilt phase of trial because his attorney failed to investigate, prepare, or present a defense to the charges against him. Although State court factual findings are entitled to a presumption of correctness under 28 U.S.C. § 2254(d), the Court recognizes that the question of effectiveness of counsel raised in the instant claim is a mixed question of law and fact which is subject to a de novo review by this Court. *Strickland*, 466 U.S. at 698, 104 S.Ct. at 2070.

1. *Deficient representation*

The standard for measuring attorney performance is "reasonableness under prevailing professional norms."

Strickland, 466 U.S. at 688, 104 S.Ct. at 2065. Trial counsel was thus bound by a standard of care applicable when this case was tried in 1978 in Shelby County, Tennessee. The Tennessee Supreme Court established the standard applicable at that time in *Baxter v. Rose*, 523 S.W.2d 930 (Tenn.1975). In *Baxter*, the court stated that attorney competence would be measured under the "duties and criteria" set forth in *United States v. DeCoster*, 487 F.2d 1197 (D.C.Cir.1973); the Sixth Circuit standard established in *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir.1974); and the American Bar Association Standards relating to the Administration of Criminal Justice, particularly those portions of the Standards relating to the "Defense Function." *Baxter*, 523 S.W.2d at 936.

The *Baxter* court therefore adopted the Sixth Circuit's requirement that defense counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law; conscientiously protect his client's interest, undeflected by conflicting considerations; and investigate all apparently substantial defenses available to the defendant and assert them in a proper and timely manner. *See Beasley*, 491 F.2d at 696, *cited in Baxter*, 523 S.W.2d at 935. Moreover, the court adopted the following explanation of counsel's duties from *DeCoster*:

> Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . . [T]he adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are

> accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.

Baxter, 523 S.W.2d at 933 (citing *DeCoster*, 487 F.2d at 1204 (citation omitted)).

At the evidentiary hearing commencing before the Court on May 3, 1994, Rickman's trial counsel, Robert I. Livingston, testified that after being assigned Rickman's case, he interviewed Rickman and asked him if a statement he had given to the authorities was "true." (1 E.H.Tr. 29-30.) Livingston then stated that, after being told by Rickman that the statement was true, "From that point on, my defense was to persuade the District Attorney of Shelby County to allow Ronald Rickman to enter a plea of guilty and accept the life sentence. . . . " (*Id.* at 30.) Livingston assumed that there was no defense to the charge of first-degree murder and failed to conduct any investigation. (*Id.* at 29-31.)

Livingston acknowledged that he only presented a defense at the sentencing phase of trial. (1 E.H.Tr. 54.) With respect to the guilt phase of trial, he asserted, "There was no defense." (*Id.* at 54.) Accordingly, Livingston did not interview any witnesses[6], conduct any

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[6] Approximately 40 witnesses testified at trial for the prosecution. (1 E.H. Tr. 38.) Mr. Livingston did not interview any of the witnesses prior to trial. (*Id.*) Moreover, Mr. Livingston did not interview any of the co-defendants or any of Rickman's family or social contacts. (*Id.* at 24-29, 34-38.)

legal research, or obtain and review any records, including those regarding Rickman's employment, education, mental health, social services contacts, military service, or prison experience. (*Id.* at 23-29, 34-38.) By Livingston's account, he spent a total of sixteen hours preparing for Rickman's trial. (Pet'r E.H.Ex. 33.) Livingston's preparation consisted solely of interviews he conducted with Rickman. (*Id.*)

Livingston testified that a contemporaneous newspaper account of Rickman's trial accurately reported that Livingston's defense strategy was "to persuade the jury that his client, although judged legally competent to stand trial, is, in fact, abnormal and should not be judged as a normal person." (1 E.H. Tr. 50; Pet'r E.H. Ex. 34.) At the hearing on state post-conviction review, Livingston stated that he "was trying to show the jury that we had a sick boy on trial, a subnormal, abnormal human being on trial. . . . That was my [sic] whole object of the whole defense, was try to convince the jury that we had a sick man on trial." (P.C.Tr. 102.)

In client interview notes Livingston recorded when interviewing Rickman, Livingston noted that Rickman underwent "mental tests when he was 16 years old," and that Rickman should receive a "psychiatric examination to determine his mental competency to stand trial." (Pet'r E.H.Ex. 27, at 1, 3.) However, after Rickman was evaluated as being competent to stand trial, Livingston did not conduct any investigation of Rickman's mental status. (1 E.H.Tr. 45-46.) Livingston's testimony at the evidentiary hearing indicates that he may not have understood the legal difference between a competency determination and an insanity evaluation:

Q. Well, it is true, isn't it, Mr. Livingston, that there are questions concerning mental state that are relevant to the guilt stage of the trial?

A. Well, I can see that, yes, but as I say, I never considered that Ronald Rickman was mentally incompetent for any purpose.

Q. I am not talking about competency; I am talking about defenses at the guilt stage of the trial?

A. Well, I did what I could with what I had to convince the Jury that the man was somewhat less than a normal human being, and as far as me arguing incompetency to the Jury, I didn't, because I didn't think he was mentally incompetent, but I thought he was abnormal and subnormal, and I still do.

Q. Are you under the impression, Mr. Livingston, that incompetency is a defense to a charge of murder?

A. Of course, I do.

(*Id.* at 45-46.)

The Court finds that Livingston failed to investigate, prepare, and present a defense for Rickman. Although Livingston believed that Rickman was "abnormal" and knew that Rickman had received a psychiatric assessment at one time, Livingston failed to investigate or even recognize the mental defenses potentially available to Rickman. The Court concludes that such failures by trial counsel "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064, and

establish that counsel was deficient under the first prong of the *Strickland* test.

2. *Prejudice*

In order to prevail on his ineffective assistance of counsel claim, Rickman must demonstrate as well that counsel's deficiencies prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

The prosecution's theory and proof was that William Groseclose, through intermediary Barton Wayne Mount, conspired with Rickman and Phillip Britt to kill Mrs. Groseclose. At trial, Mount testified for the State, and statements that Rickman and Britt gave to the authorities were introduced into evidence. (Trial Tr. 200-468, 1583-1601, 2067-2090.) Rickman argues that the proof is consistent with the proposition that he did not intend to kill Mrs. Groseclose, but rather intended only to incapacitate her while he took credit for completing the contract and collected his money from Groseclose.

Rickman points out that his statement reflects that he did not have a lethal weapon when he entered the victim's residence. (Trial Tr. 1583-1601.) As well, Rickman argues that the statement supports his theory that he did not intend to kill the victim after sexually assaulting her. (*Id.* at 1590.) Rickman allowed her to shower and dress, inflicted a non-lethal battery on her with a pocket knife, and then left her, aware that she was alive, in the trunk of a car in a public library parking lot, where she died of

systemic hyperthermia. (*Id.* at 1590-1591.) Rickman therefore argues that there is a reasonable likelihood that he would have been convicted of a lesser degree of homicide, but not first-degree murder, if the jury had been presented with the theory that he did not have the intent to kill Mrs. Groseclose.

In addition, Rickman asserts that he was prejudiced by Livingston's failure to investigate mental health defenses or to introduce the testimony of a mental health expert. In support of his claim, Rickman introduced the testimony of a clinical psychologist, Dr. Gillian Blair, at the evidentiary hearing. Dr. Blair has conducted several tests and interviews with Rickman and has reviewed Rickman's social history.[7] (2 E.H.Tr. 46-175.) Rickman argues that Dr. Blair's testimony supports the proposition that Rickman did not willfully premeditate and deliberate to kill Mrs. Groseclose.

Dr. Blair testified that Rickman suffered a devastating childhood that has resulted in his development as a tenuous and fragmented social misfit, with low self-esteem and deep-seated feelings of inferiority. (2 E.H.Tr. 51-74.) Although Dr. Blair believes that Rickman was sane at the

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[7] Dr. Blair reported that she administered a full psychological battery of tests on Rickman; conducted twelve to fifteen hours of interviews with Rickman; talked with Rickman's adoptive mother and one of his sisters; and reviewed school records, medical records, psychological records, South Carolina Department of Child Welfare records, naval records, adoption reports, prison records, interviews with family members, transcripts and evidence in Rickman's capital case, and the extensive social history of Rickman and his extended family prepared by Pat Feigley, MSW. (2 E.H. Tr. 46-52, 107.)

time of the crime, she has concluded as well that Rickman's psychological profile is not that of a cold-blooded killer. (*Id.* at 139, 159.) Dr. Blair stated that Rickman needed to impress those around him as a "tough guy" by making plans about which he was actually ambivalent to carry out. (*Id.* at 158-60.) Dr. Blair stated, however, that at the time of the crime Rickman understood the wrongfulness of his actions and could conform his behavior to the requirements of the law. (*Id.* at 80.)

Although it is quite possible that Rickman's defense would have benefitted from some investigation and research by Livingston, the Court is unable to determine how exactly the lack of such investigation and research resulted in prejudice. In addition, the Court finds no prejudice resulting from Livingston's failure to have a psychological expert testify during the guilt phase of trial because an expert such as Dr. Blair would have testified that Rickman was sane and that he could have premeditated a murder. The Court concludes that Rickman has failed to demonstrate that counsel's deficiencies, as significant as they were, resulted in actual prejudice.

The Court recognizes, however, that there are certain situations in which it is unnecessary to demonstrate "prejudice" in order to prove ineffective assistance of counsel. *See United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984). For example, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* Where counsel thus "fail[s] to function in any meaningful sense

as the Government's adversary," *id.* at 666, 104 S.Ct. at 2051, prejudice is presumed. *Id.* at 659, 104 S.Ct. at 2047.

Functionally, a defendant may be totally denied counsel even though his attorney is physically present during the proceedings. *Lombard v. Lynaugh,* 868 F.2d 1475, 1480 (5th Cir.1989) (citing Cronic for proposition that constructive denial of counsel is also presumptively prejudicial). Counsel is required to remain an "active advocate," *Evitts v. Lucey,* 469 U.S. 387, 394, 105 S.Ct. 830, 835, 83 L.Ed.2d 821 (1985), and observe a duty of "zealous and loyal representation," *Nix v. Whiteside,* 475 U.S. 157, 188, 106 S.Ct. 988, 1005, 89 L.Ed.2d 123 (1986). *See also United States v. Swanson,* 943 F.2d 1070, 1075 (9th Cir.1991) (defense counsel's actions in assisting the prosecutor constituted abandonment of counsel's duty of loyalty to client and created conflict of interest). Notably, "attorneys who adopt the role of the judge or jury to determine the facts pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment." *Nix,* 475 U.S. at 189, 106 S.Ct. at 1005 (citation omitted).

In a case with facts similar to the instant action, the Court of Appeals for the Tenth Circuit held defense counsel to be ineffective in a capital case where counsel was unprepared and antagonistic toward his client. *Osborn v. Shillinger,* 861 F.2d 612 (10th Cir.1988). The strategy of Osborn's counsel, like that of Livingston, was simply to persuade the prosecutor not to seek the death penalty for his client. *Id.* at 626. When the prosecutor continued to pursue the death penalty, Osborn's attorney was wholly unprepared, and his failure to investigate had not been

based on a reasonable determination that further investigation was unnecessary. *Id.* at 626-27.

The Tenth Circuit thus recognized that "an attorney who adopts and acts upon a belief that his client should be convicted 'fails to function in any meaningful sense as the Government's adversary.' " *Osborn*, 861 F.2d at 625 (citing *Cronic*, 466 U.S. at 666, 104 S.Ct. at 2051). The Osborn court specifically criticized counsel for making statements to the press about his client which "could easily have come from the prosecutor, rather than defendant's counsel," *id.* at 628, and warned that "an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants because the interests of the state and the defendant are necessarily in opposition." *Id.* at 629.

In the instant action, there is overwhelming evidence that Livingston was sympathetic to the prosecution and effectively abandoned representation of Rickman at trial. For example, in cross-examining prosecution witness and co-conspirator Barton Wayne Mount, Livingston suggested to Mount that Mount had carefully planned out the crime with Rickman and the other co-defendants "to the nth degree," listing the name of each co-defendant separately for greater emphasis. (Trial Tr. 329.) Livingston reinforced the notion of planning despite proof which suggested that the defendants entered the victim's residence without a lethal weapon and may have lacked a coherent plan at that point as to how she was to be killed.

Livingston repeatedly elicited testimony which portrayed Rickman in a deviant, destructive, and threatening

light. Livingston asked Mount if he did not consider the defendants to be "nuts," if he thought them to be "normal," chided Mount because Mount "never suspected that there was anything wrong with either one of them," and concluded, "You wouldn't know a psychiatric case if you saw one, would you?" (Trial Tr. 292.) In examining Pamela Baker Lindsey, with whom Rickman had been living at the time of the victim's death, Livingston referred to Rickman's apparent nickname, "Bull," by asking her if Rickman "act [ed] like a bull . . . I mean, violent. . . . " (*Id.* at 846.) Lindsey responded, "When he was mad, yes." (*Id.*)

For no apparent reason, Livingston referred several times to a hand grenade detonator and a motorcycle jacket that allegedly belonged to Rickman. Moreover, while making such references, Livingston demonstrated contempt for his own client. Livingston thus engaged in the following exchange with Lindsey:

> Q. Did Ron ever tell you he was going to blow somebody up with it? [referring to the grenade detonator]
>
> A. He was always threatening to bomb the 7-Eleven stores . . . but I didn't believe him.
>
> Q. What other crimes did he tell you he was going to commit that you didn't believe?
>
> A. Is that really important?
>
> Q. Yes, ma'am.
>
> A. He was always talking about catching some buildings on fire if he was mad at somebody. . . . One time he threatened to kill a person over me.

(Trial Tr. 849-50.) Livingston asked Ralph Vance, the son of Rickman's apartment manager, "Do you think average red-blooded American boys wear something like this [motorcycle jacket]?" (*Id.* at 942-43.) Referring to the hand grenade detonator, Livingston asked Vance, "Do you think a normal red-blooded American boy would walk around with a live grenade? What do you think about that?" (*Id.* at 944.) Vance answered, "Well, it's not all the grenade. It's a detonator there. . . . " (*Id.*)

When Livingston examined Ron Casper, a member of the United States Marine Corps who lived in Rickman's apartment building, Livingston asked, "You also thought that Ron Rickman was a gentleman, didn't you?" When Casper responded, "Yes, sir, I am under that impression," Livingston commented, "[Nineteen] years in the Marines and you would think that a man that looked like that was a gentleman?" (Trial Tr. 960.) Then, at a later point in Casper's examination, Livingston engaged in the following exchange:

> Q. . . . When you saw him walking around out there looking like a Buddhist monk,[8] did you call this girl [Pamela Baker Lindsey]'s brother and say: Look, your little sister's getting ready to run off with a fellow that looks like a Buddhist monk.
>
> A. No sir, I did not.

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[8] At the evidentiary hearing before this Court, Mr. Livingston testified sarcastically that upon first seeing Rickman, "I thought the man was a Buddhist monk." (1 E.H. Tr. 17.) Rickman's head was shaved at that time.

Q. . . . Now, you think, a fellow that looks like a Buddhist monk is a normal, average, red-blooded American boy?

A. Depends on what he wants to do.

(Trial Tr. 987-88.)

Livingston's antagonism toward his client was perhaps best illustrated when he cross-examined Anthony Scola and Royce Wolfe. Scola and Wolfe were called by the State to testify that they had observed Rickman and Britt in what appeared to be the victim's car. Livingston cross-examined Scola about Rickman as follows:

Q. Did he appear to be intoxicated?

A. I don't think so.

Q. Did he appear to be under the influence of any type of narcotic drug?

A. I really don't know.

Q. What about his eyes? Did he kind of have a wild, glassy look in his eyes?

A. I didn't look at his eyes.

Q. You just looked at that grin on his face.

A. Well, he just turned his head and smiled. I didn't think anything of it. . . .

Q. Normal looking fellow, wasn't he?

A. I guess so.

Q. . . . Yeah. You wouldn't call somebody that looked like this a normal, average, American looking boy, would you? [demonstrating Rickman's mug shot]

A. In this day and time, yes.

Q. . . . Thank God, I'm abnormal.

(Trial Tr. 1042-44.) After taking Wolfe through the same line of questioning as Scola, Livingston asked Wolfe:

Q. You haven't been out on the street today then, have you? Woods is full of them, didn't you know that? Guys that look like this. Long hair. Long beard. Wild eyed. You know they're out there, don't you? I know they're out there.

A. Right.

Q. Grinning. Like they just got out of somebody's insane asylum. You know what I'm talking about, don't you?

A. I know what you're talking about.

(Trial Tr. 1074-75.) Rickman's own attorney thus presented a terrifying image of Rickman to the jury through his questioning of the witnesses.

Livingston's disregard for his client is evidenced as well by his failure to conduct any investigation into possible defenses or interview any witnesses or principals other than Rickman himself prior to trial. Livingston believed there was no defense available at the guilt stage. Accordingly, Livingston did not attempt to present any defense except to show that Rickman was "abnormal" or "subnormal," neither of which constitutes a legal defense or justification. Finally, when the Shelby County Sheriff's Office began administering Meprobamate and Dalmane to Rickman, Livingston did not seek medical advice about the effect of the drugs or ask Rickman about the effect of

the drugs on him. (1 E.H. Tr. 84-85.) According to Livingston, it was his impression that the drugs simply "calmed him down" and "[i]f the doctor prescribed . . . the medication, I had no opinion one way or the other." (2 P.C. Tr. 144; 1 E.H.Tr. 85.)

The Court finds that Livingston was hostile to his client and so burdened by a conflict of interest that he failed to subject the prosecution's case to meaningful adversarial testing as required under the Sixth Amendment.[9] *See Cronic*, 466 U.S. at 659, 104 S.Ct. at 2047;

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[9] Although Mr. Livingston's representation at sentencing is not before the Court, Mr. Livingston's remarks to the jury at sentencing are illustrative of the hostility the Court finds Mr. Livingston must have manifested toward Rickman throughout the trial. For example, Mr. Livingston stated:

> . . . . I know this young woman was put in the trunk of that car. That's no secret. I know that. And I'm not happy about it. No, sir. I'm not happy. I'm ashamed. I'm ashamed that we live in such a world. . . . I'm ashamed that this crime has been committed in our community. And I want the family of Debra [sic] Groseclose to know that. That I'm ashamed. I'm ashamed that this young woman died in this oven. Mr. Miller, I'm ashamed. I'm ashamed, Mr. Stanton. I don't condone murder. I know criminal defense lawyers suffer from what is called guilt by association. When I go to church Sunday, they are going to waylay me out at the Bellevue Baptist Church. . . .

(Closing Arg. Tr. 52.) Mr. Livingston then commented further:

> . . . [T]hat wild man [Rickman] over there with the gloves on – look at him. He's wild as a March hare, right now. He may take off after me in a minute. I don't know. He's crazy. I know he's crazy. Because if

Osborn, 861 F.2d at 625. Under the unusual circumstances present in this action, prejudice is therefore presumed. *Cronic*, 466 U.S. at 659, 104 S.Ct. at 2047. The Court concludes that Rickman received constitutionally ineffective assistance of counsel at the guilt phase of trial.

B. *Claim 2: False Testimony of Barton Wayne Mount*

Rickman alleges that the State improperly presented Barton Wayne Mount's false and misleading testimony and withheld evidence concerning Mount's credibility and the truth of his statements.

It is fundamental that a State may not use false testimony to obtain a conviction against a criminal defendant. *See Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935). The same prohibition exists when "the State, although not soliciting false testimony, allows it to go uncorrected when it appears." *Giglio*, 405 U.S. at 153, 92 S.Ct. at 766 (quoting *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959)). *See also Bragan v. Morgan*, 791 F.Supp. 704, 713 (M.D.Tenn.1992) (relief available where witness, "although not technically committing perjury, left the jury with a materially false impression"). Moreover, if the State suppresses evidence favorable to an accused, due process is violated "where the evidence is material either to guilt or to punishment, irrespective of

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> he's normal I can only say, thank you, God, I'm abnormal, an [sic] you are abnormal. . . .

(*Id.* at 68.)

the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963).

When a witness testifies against a co-defendant, evidence of any understanding or agreement is relevant to such witness' credibility and a jury is entitled to consider it. *See Campbell v. Reed*, 594 F.2d 4, 7 (4th Cir.1979); *Brown v. Wainwright*, 785 F.2d 1457, 1465 (11th Cir.1986) (jury entitled to consider "realities of what might induce a witness to testify falsely"). Because "[i]t is a constitution we deal with, not semantics," *Brown*, 785 F.2d at 1465, it makes no practical difference "whether the understanding is consummated by a wink, a nod and a handshake, or by a signed and notarized formal document ceremoniously impressed with a wax seal. A deal is a deal." *Duggan v. State*, 778 S.W.2d 465, 468 (Tex.Crim.App.1989). Moreover, a co-defendant who testifies with only a reasonable expectation or understanding of leniency, but not a formal agreement, has an even more powerful incentive to testify falsely in order to facilitate a conviction and curry favor with a prosecutor. *Campbell*, 594 F.2d at 7-8 (for purposes of assessing credibility, absence of a formal agreement only increases significance of witness' expectation of favorable treatment).

1. *Giglio violation*

On the basis of the evidence presented, the Court finds that Mount testified falsely when he stated that he had received no benefit and expected to get no benefit from his testimony. General Stanton testified that, prior to Rickman's trial, he had agreed to sever Mount and take

into consideration Mount's cooperation at a later point. Mount had been counseled by his attorneys that it would be to his benefit to testify for the State. In that expectation, Mount had not requested immunity for two statements he gave to the District Attorney's Office or for his testimony at trial. Indeed, the State had agreed not to use Mount's incriminating statements against him, and intended to treat Mount with leniency. The State's deal with Mount was finally consummated when Mount's cooperation was no longer needed, after Rickman was convicted and his motion for a new trial had been denied.

Accordingly, the Court finds that the State allowed Mount to testify falsely when Mount testified that he had not received or expected any consideration for his testimony; that he had not "made a deal to deal" with the District Attorney; that he faced electrocution as a possible punishment; and that the State would use his testimony against him if the State chose to do so. Instead, the State and Mount had an understanding, implicit or explicit, that Mount would receive leniency and consideration, and in fact Mount received such consideration both before and after trial. The State and Mount had an understanding that Mount's statement would not be used against him, and that Mount would not face the death penalty. The State was under an affirmative duty to correct Mount's false and misleading testimony, and the State failed to do so.

Where a conviction is obtained by the knowing use of perjured testimony, it is fundamentally unfair and must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct.

2392, 2397, 49 L.Ed.2d 342 (1976). The writ must issue unless the failure to disclose perjured testimony is harmless beyond a reasonable doubt. *United States v. Bagley*, 473 U.S. 667, 679-80, 105 S.Ct. 3375, 3382, 87 L.Ed.2d 481 (1985).

Mount's testimony was critical to the State's case against Rickman. Mount provided the only eyewitness account of the planning that occurred among the co-defendants. Mount's testimony thus went directly to the issues of premeditation and deliberation, elements the jury was required to find for first-degree murder. Moreover, the State relied heavily on Mount's eyewitness testimony in its closing argument. (Closing Arg. Tr. 6-9, 11-12.) If the jury had known that Mount was testifying in order to receive consideration from the State and save himself from a death sentence, and that there was an implicit understanding of immunity for Mount's testimony, there is a reasonable likelihood that the jury would not have relied upon Mount's testimony in finding the requisite *mens rea* for first-degree murder. Because the State has not demonstrated that the perjurious testimony was harmless beyond a reasonable doubt, the Court grants the writ.

2. *Brady violation*

The file of the Shelby County District Attorney General contains several documents about which neither Rickman nor any attorney representing him had knowledge until the file was made available in 1992. Specifically, the file includes documents which reflect that prior to trial: (1) Mount's attorney Richard Vaughn

requested discovery from the State by letter dated November 22, 1977 (Pet'r E.H. Ex. 1); (2) Mount was interviewed by District Attorney General Hugh Stanton on December 5, 1977, in the presence of his attorneys (Pet'r E.H. Ex. 10); (3) Mount's attorney James Galloway forwarded Mount's telephone bill to Assistant District Attorney Jewitt Miller by letter dated December 5, 1977 (Pet'r E.H. Ex. 2); (4) Galloway wrote to the Warden of the MCC on December 7, 1977, "to advise [the Warden] that as a condition of his incarceration . . . Barton Wayne Mount and I agree that he is not to have any visitors except [his lawyers] and his parents," and to instruct the Warden that they were "agreeable" to Mount having his mail and phone calls censored (Pet'r E.H. Ex. 3)[10]; and (5) Mount, Galloway, Stanton, and Miller met again on February 6, 1978 (Pet'r E.H. Ex. 11).

The State never informed Livingston that any of these documents existed, and never described the substance of the information contained in the documents or the content of the meetings between the District Attorney General's Office and Mount and his attorneys. Moreover, Livingston was never provided Mount's records from the Tennessee Department of Correction. (1 E.H. Tr. 90; Pet'r

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[10] The Court instructs the State that the Court admits Petitioner's exhibit 3 as relevant to show that Mount's attorneys were in contact with the prosecution, and overrules the State's hearsay objection on the grounds that exhibit 3 has not been offered to prove the truth of the matters asserted in the document. For the same reasons, the Court overrules the State's objections to the admission of a letter from Mount to Assistant Attorney General Miller marked as Petitioner's exhibit 8, and to the objections to the admission of Petitioner's exhibit 22.

E.H. Ex. 20.) Despite the fact that Rickman's post-conviction counsel requested all District Attorney General records relating to Rickman's case, the District Attorney General's Office continued to withhold Rickman's file until compelled to do so in 1992 by the ruling in *Capital Case Resource Center v. Woodall*, No. 01-A-01-9104-CH-00150, 1992 WL 12217, 1992 Tenn.App. LEXIS 94 (Tenn.App. Jan. 29, 1992), in which it was determined that files held by District Attorneys General were "public records" under the Tennessee Public Records Act.

The Court finds that the State failed to provide material evidence with which Rickman could have effectively cross-examined and impeached Mount, and which demonstrates that Mount testified falsely at trial. The Court concludes that there is a reasonable probability that the outcome of the trial would have been different if the State had provided the material to Rickman's counsel and Rickman's counsel had then used it to impeach Mount. *See Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383.

Furthermore, although Rickman has never presented his claims concerning Mount's testimony to the State courts, the Court rejects the State's assertion that the claims are procedurally defaulted. Recognizing that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *Engle v. Isaac*, 456 U.S. 107, 128, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783 (1982), this Court will nevertheless defer only to legitimate state procedural defaults, and not to procedural defaults which do not promote a legitimate state interest. *See Henry v. Mississippi*, 379 U.S. 443, 447-48, 85 S.Ct. 564, 567, 13 L.Ed.2d 408 (1965).

The Court finds that the State of Tennessee simply has no legitimate interest in presenting false testimony and withholding relevant evidence to convict Rickman or any other defendant. If this Court enforced the procedural default under such circumstances, the Court would thereby reward the State for engaging in deceptive activities which enable the State to circumvent the Constitution.

Even if the State arguably has a legitimate basis for enforcing the procedural default, the Court may consider Rickman's claim if he establishes "cause" for the procedural default and "prejudice" attributable thereto. *See Murray v. Carrier*, 477 U.S. 478, 485, 106 S.Ct. 2639, 2644, 91 L.Ed.2d 397 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87-91, 97 S.Ct. 2497, 2506-08, 53 L.Ed.2d 594 (1977). Rickman has thus established "cause" by showing that the factual or legal basis for the claim was not reasonably available to counsel or that some interference by officials made compliance impracticable. *See Murray*, 477 U.S. at 488, 106 S.Ct. at 2645. *See also Fairchild v. Lockhart*, 979 F.2d 636, 640 (8th Cir.1992) ("cause" for failure to raise claim where State assured counsel that State had provided entire file and where claim based on material later discovered in file which State had inadvertently failed to disclose), *cert. denied*, ___ U.S. ___, 113 S.Ct. 3051, 125 L.Ed.2d 735 (1993); *Bliss v. Lockhart*, 891 F.2d 1335, 1341 (8th Cir.1989) (State's presentation of misleading evidence by witness at trial may constitute "cause"); *Julius v. Jones*, 875 F.2d 1520, 1525 (11th Cir.1989) ("cause" where prosecutor failed to produce Brady material and failure unknown to defendant), *cert. denied*, 493 U.S. 900, 110 S.Ct. 258, 107 L.Ed.2d 207 (1989). The State's failure to

disclose information placed Rickman at an actual and substantial disadvantage, thereby denying him a fair trial. Rickman has demonstrated that the guilt phase of his trial was infected with constitutional error, and has established "cause" and "prejudice" for any alleged procedural default.[11]

C. *Claim 3: Unconstitutional "Reasonable Doubt" Instruction*

Rickman alleges that he was denied his rights under the Sixth, Eighth, and Fourteenth Amendments because the jury was charged with an unconstitutional "reasonable doubt" instruction at the guilt phase of trial. The State argues that this Court may not consider Rickman's claim because Rickman failed to raise it in any of his state court proceedings and it is now procedurally defaulted.

1. *Procedural default*

On Rickman's direct appeal, the Tennessee Supreme Court affirmed Rickman's conviction after reviewing the entire record for error. The Tennessee Supreme Court explained the scope of its review as follows:

> After careful consideration of the assignments of error made on behalf of appellants and of the

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[11] Accordingly, the Court overrules the State's objections, raised at the evidentiary hearing, to the admission of Petitioner's exhibits 1 through 22, as well as to the admission of Petitioner's exhibit 37. Because Rickman's claim is not procedurally defaulted, such exhibits are relevant to assess the claim on its merits.

> entire record, we are of the opinion that the verdict and sentence are sustained by the evidence and that no reversible error was committed at the very lengthy trial out of which these appeals arise.

Groseclose, 615 S.W.2d at 144. Accordingly, the Tennessee Supreme Court addressed Rickman's "reasonable doubt" claim, as well as all other claims arising from the record, on the merits, and there is no procedural default. *See Ylst v. Nunnemaker*, 501 U.S. 797, 111 S.Ct. 2590, 2593, 115 L.Ed.2d 706 (1991) (bar to federal review is removed where last state court presented with federal claim reaches merits). In addition, because the Tennessee Supreme Court is under the obligation to consider "fundamental error" in jury instructions, any alleged bar to consideration of this claim would not be "independent" of federal law. *See, e.g., State v. Reece*, 637 S.W.2d 858, 861 (Tenn.1982); *State v. Thompson*, 519 S.W.2d 789, 792 (Tenn.1975). *See also State v. Ogle*, 666 S.W.2d 58, 60 (Tenn.1984) (Tennessee Supreme Court also reviews claims of plain error).

The Court recognizes as well that a procedural default presupposes the existence of a firmly established state procedural rule which is applicable to Rickman's claim and with which Rickman has not complied. *See Warner v. United States*, 975 F.2d 1207, 1213 (6th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1314, 122 L.Ed.2d 702 (1993). It is evident that there was no firmly established state procedural rule requiring Rickman to object to the constitutionality of the jury instruction at trial. *See Capri Adult Cinema v. State*, 537 S.W.2d 896, 900 (Tenn.1976) ("constitutional issues may be raised for first time on

appeal"). Similarly, on direct appeal Rickman was not required by Tenn.Code Ann. § 40-3409 to allege issues as error under any specific instances, as the Tennessee Supreme Court was "bound . . . to consider any errors in the record, whether there has been an assignment [of error] or not." *James v. State*, 215 Tenn. 221, 385 S.W.2d 86, 90 (1964) (Tennessee Supreme Court reviews entire record on direct appeal under Tenn.Code Ann. § 40-3409), *cert. denied*, 381 U.S. 941, 85 S.Ct. 1777, 14 L.Ed.2d 705 (1965), *cited with approval in Adams v. State*, 547 S.W.2d 553, 557 (Tenn.1977).[12] *See also Miller v. State*, 584 S.W.2d 758, 760-61 (Tenn.1979) (quoting *James-Adams* mandate). Rickman thereby received review of his claim on direct review and did not commit procedural default.

In the event that Rickman did not receive review of his claim in state court proceedings, however, the Court finds that Rickman has established "cause" for his procedural default because there were no attorneys raising such a claim in Tennessee courts and there were no reported decisions indicating that such a claim had been litigated in Tennessee courts at the time of Rickman's trial, appeal, or post-conviction proceedings.[13] *See McBee*

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[12] Even several years after Rickman's trial, the Tennessee Supreme Court recognized that where a defendant has been sentenced to death "this court is under the duty to 'automatically' review the sentence, which imposes the burden on this court to consider any alleged error, whether called to the trial court's attention or not." *State v. Duncan*, 698 S.W.2d 63, 67-68 (Tenn.1985), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986).

[13] Any failure by Rickman to raise his claim may also be excused because failure to reach the merits of the claim could

v. Grant, 763 F.2d 811, 817, 817 n. 5 (6th Cir.1985) ("cause" exists where legal issue not fully resolved at the time of the alleged default). Because Rickman was prejudiced as a result, his claim is not procedurally defaulted. *See Murray*, 477 U.S. at 485, 106 S.Ct. at 2644; *Wainwright*, 433 U.S. at 87-91, 97 S.Ct. at 2506-08.

2. *Merits*

The Constitution requires the government to "prove beyond a reasonable doubt every element of a charged offense." *Victor v. Nebraska*, 511 U.S. ___, ___, 114 S.Ct. 1239, 1242, 127 L.Ed.2d 583 (1994) (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). However, no particular form of words is constitutionally mandated when advising the jury of the government's burden of proof. *Victor*, 511 U.S. at ___, 114 S.Ct. at 1243. Instead, "taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury." *Id.* (citation omitted). To evaluate the constitutionality of a jury instruction, "the proper inquiry is not whether the instruction could have been applied in [sic] unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." *Id.* (citation omitted) (emphasis in original).

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result in a "fundamentally unjust incarceration." *Murray*, 477 U.S. at 495, 106 S.Ct. at 2649 (citing *Engle*, 456 U.S. at 135, 102 S.Ct. at 1576). As the Supreme Court has recognized, an improper "reasonable doubt" instruction is a structural error which necessarily renders a conviction fundamentally unfair. *See Sullivan v. Louisiana*, 508 U.S. ___, ___-___, 113 S.Ct. 2078, 2082-83, 124 L.Ed.2d 182 (1993).

In the instant case, Rickman alleges that his constitutional rights were violated by the following jury instruction:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense. (Trial Tr. 2422.)

Rickman argues that this "reasonable doubt" instruction is similar to the "reasonable doubt" instruction held to be unconstitutional in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1991).

In *Cage*, the jury was provided with the following "reasonable doubt" instruction:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty,* raised in your mind by reasons of the unsatisfactory character of the evidence or lack

> thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*

Cage, 498 U.S. at 40, 111 S.Ct. at 329 (emphasis in original). The Supreme Court held that the instruction in *Cage* allowed a reasonable juror to find guilt based on a degree of proof below that required by the Constitution. *Id.* at 41, 111 S.Ct. at 330. In particular, the Court took exception to language in the instruction which equated "reasonable doubt" with "grave uncertainty" and an "actual substantial doubt," and which stated that what was required was a "moral certainty," rather than an "evidentiary certainty," that the defendant was guilty. *Id.* at 40-41, 111 S.Ct. at 329-30.

The Supreme Court has recently held that the term "moral certainty" does not, of itself, render a "reasonable doubt" instruction unconstitutional. *See Victor*, 511 U.S. at ___-___, 114 S.Ct. at 1247-48. For example, reference to the phrase "moral certainty" is constitutionally permissible where the rest of the instruction "lends content to the phrase," *id.* at ___, 114 S.Ct. at 1247, and indicates the government's proper burden of proof. *Id.* In *Victor*, the Court thus upheld the constitutionality of a "reasonable doubt" instruction that included the statement:

> It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty*, of the truth of the charge.

Victor, 511 U.S. at ___, 114 S.Ct. at 1244 (emphasis in original).[14] The Court expressly found that the "abiding conviction" language, when used in conjunction with the reference to "moral certainty," properly stated the government's burden of proof. *Id.* at ___, 114 S.Ct. at 1247. However, the Court recognized that an instruction which requires only that jurors be "morally certain" of a defendant's guilt impermissibly suggests "a standard of proof lower than due process requires or . . . conviction on factors other than the government's proof." *Id.* at ___, 114 S.Ct. at 1248.

The Court finds that unlike the instruction in *Victor*, *see Victor*, 511 U.S. at ___, 114 S.Ct. at 1247, the entire "reasonable doubt" instruction in this case does not lend content to the phrase, "[M]oral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense." (Trial Tr. 2422.) Moreover, the instruction contains yet another ambiguous phrase in that "reasonable doubt" is defined as "an inability after such investigation [of all the proof in the case] to let the mind rest easily upon the certainty of guilt." (*Id.*) The Court finds that the "moral certainty"

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[14] The entire instruction provided: "Reasonable doubt is defined as follows: It is *not a mere possible doubt*; because everything relating to human affairs, and *depending on moral evidence*, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty*, of the truth of the charge." *Victor*, 511 U.S. at ___, 114 S.Ct. at 1244 (emphasis in original).

language in conjunction with the "mind rest easily" language suggests to a reasonable juror a lower burden of proof than what is constitutionally required.

The jury-instruction error in this case is not subject to harmless error review. *Sullivan*, 508 U.S. at ___, 113 S.Ct. at 2082. Furthermore, relief on this claim is not barred under the rule of *Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060, 1075, 103 L.Ed.2d 334 (1989), that habeas relief is unavailable where the petitioner is requesting a "new rule" of constitutional criminal procedure, because the application of a general principle of law to a different factual situation does not create a "new rule" of law. *See, e.g., Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). A "new rule" is created only when the legal principle applied in the case was not dictated by precedent existing at the time the defendant's conviction became final. *Penry v. Lynaugh*, 492 U.S. 302, 314, 109 S.Ct. 2934, 2944, 106 L.Ed.2d 256 (1989).

Rickman is not seeking a "new rule" of law, but merely application of the principle announced in *Winship*, 397 U.S. 358, 90 S.Ct. 1068, that the jury only convict him with proof beyond a reasonable doubt that he was guilty. Although Tennessee courts were apparently not addressing challenges based on this principle at the time of Rickman's trial, the principle was well-settled at the time of his trial and through the duration of his State proceedings. Relief is not barred on the basis of non-retroactivity because it would have been unreasonable for any judge to deny Rickman's claim if the claim had been reasonably available to Rickman to raise at an earlier point. *See Stringer*, 503 U.S. at ___, 112 S.Ct. at 1140 (federal relief

available if state courts' interpretation of existing precedent objectively unreasonable).

D. *Claim 4: Involuntary Confession*

Rickman raises Fifth and Sixth Amendment challenges to the admissibility of a statement he gave to police shortly after being arrested for Mrs. Groseclose's murder.

1. *Procedural default*

It is undisputed that at trial Rickman presented his claim that the statement was extracted in violation of the Fifth Amendment. Although Rickman did not raise the Fifth Amendment claim again on direct appeal, the Court is unaware of any State rule requiring Rickman to do so. Moreover, the Tennessee Supreme Court has recognized that it is obligated to review any errors in the record, whether there has been an assignment of error or not. *See Adams*, 547 S.W.2d at 557. Accordingly, the Court finds that Rickman's claim was properly presented to the State courts and is not procedurally defaulted for failure to comply with a firmly established state procedural rule. *See Warner*, 975 F.2d at 1213.

By contrast, the Court finds that Rickman's Sixth Amendment claim has not been properly presented to the State courts, and the State statute of limitations has run on his right to file a subsequent petition for post-conviction relief. *See* Tenn.Code Ann. § 40-30-102. Absent a showing of "cause" and "prejudice," Rickman's Sixth Amendment claim is procedurally defaulted for failure to

present his claim within the statutory time permitted under Tennessee law. *See Teague*, 489 U.S. at 297-98, 109 S.Ct. at 1068; *Wainwright*, 433 U.S. at 87-91, 97 S.Ct. at 2506-08. Although Rickman received constitutionally ineffective assistance of counsel at trial, Rickman has not demonstrated that he also received constitutionally ineffective assistance of counsel on appeal, where Rickman could have raised his Sixth Amendment claim for the first time.[15] Rickman's Sixth Amendment claim is therefore procedurally defaulted.

2. *Merits of Fifth Amendment claim*

Outside of the presence of the jury, the trial court held a hearing to determine the admissibility of Rickman's statement. (Trial Tr. 1494-1507, 1508-73.) Rickman asserted that he had not freely and voluntarily waived his *Miranda* rights, and that he had given his statement to the police only after they had repeatedly ignored his requests for counsel. (*Id.* at 1556-57.) Police officials testifying for the State denied Rickman's version of events, and asserted that Rickman voluntarily and willingly provided the statement and never requested an attorney. (*Id.* at 1494-1507, 1508-21, 1522-53.) The trial court resolved the credibility issue in favor of the State, found that Rickman had been advised of his rights and had given his statement freely and voluntarily, and admitted Rickman's statement into evidence. (*Id.* at 1571-73.)

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[15] In reaching this conclusion, the Court finds it significant that Rickman was represented by a different attorney on appeal.

Rickman now argues that the State court factfindings are not entitled to a presumption of correctness under 28 U.S.C. § 2254(d) because until 1992 the State withheld documents from Rickman which support his version of the events surrounding the statement he gave to police. Specifically, Rickman argues that the interview notes maintained by the three police officials who took Rickman's statement contain several material discrepancies. Rickman focuses on the fact that one interviewer's notes reflect that Rickman initially denied having knowledge of Mrs. Groseclose's murder. As well, Rickman points out that one interviewer inaccurately testified that Rickman met with Pamela Baker Lindsey immediately before giving his statement, during the nineteen minutes between 9:30 AM, when the interview began, and 9:49 AM, when Rickman started giving his statement.

The Court finds Rickman's argument to be without merit. At the hearing before the trial court, Rickman denied that he had been threatened or intimidated in any way before giving his statement. (Trial Tr. 1557.) Even if Rickman initially denied knowledge of the murder and nineteen minutes elapsed before Rickman began giving his statement to the police, the Court finds such information immaterial to the central dispute regarding the alleged requests for counsel Rickman made prior to giving his statement. The Court presumes the State court factual findings on this claim are correct under 28 U.S.C. § 2254(d), and concludes on the basis of those findings that Rickman voluntarily waived his Fifth Amendment rights. Rickman's statement was properly admitted at trial.

E. *Claim 5: Admission of Grenade Detonator*

Evidence of a grenade detonator that allegedly belonged to Rickman was admitted at trial over Rickman's objection. The Tennessee Supreme Court held on direct appeal, however, that Rickman's initial objection "must be deemed waived by failure to renew the objection at an appropriate time." *Groseclose*, 615 S.W.2d at 147. Because this is a capital case, however, Rickman was under no duty to object to the introduction of evidence at trial. *See Duncan*, 698 S.W.2d at 67-68. The Court finds, therefore, that Rickman violated no firmly established state procedural rule which would bar consideration of this claim. *See Warner*, 975 F.2d at 1213 (citing *Ford v. Georgia*, 498 U.S. 411, 111 S.Ct. 850, 857, 112 L.Ed.2d 935 (1991)). Moreover, the trial court was on notice that Rickman objected to the admission of the grenade detonator evidence, and any requirement that Rickman object more than once would constitute "an arid ritual of meaningless form." *Osborne v. Ohio*, 495 U.S. 103, 124-25, 110 S.Ct. 1691, 1704, 109 L.Ed.2d 98 (1990) (citing *James v. Kentucky*, 466 U.S. 341, 349, 104 S.Ct. 1830, 1835, 80 L.Ed.2d 346 (1984)).

The introduction of prejudicial evidence at a State criminal trial violates the Constitution if it "so infused the trial with unfairness as to deny due process of law." *Estelle v. McGuire*, 502 U.S. 62, ___, 112 S.Ct. 475, 484, 116 L.Ed.2d 385 (1991) (quoting *Lisenba v. California*, 314 U.S. 219, 228, 62 S.Ct. 280, 286, 86 L.Ed. 166 (1941)). In evaluating whether the admission of evidence violates the Constitution, a federal habeas court must assess whether the

prejudicial impact of the evidence outweighs its probative value so as to rise to the level of a due process violation. *See Lesko v. Owens*, 881 F.2d 44, 51 (3d Cir.1989), *cert. denied*, 493 U.S. 1036, 110 S.Ct. 759, 107 L.Ed.2d 775 (1990); *Collins v. Francis*, 728 F.2d 1322, 1336 (11th Cir.1984), *cert. denied*, 469 U.S. 963, 105 S.Ct. 361, 83 L.Ed.2d 297 (1984). In order for an error to constitute fundamental unfairness, it must "be material in the sense of a crucial, critical, highly significant factor." *Collins*, 728 F.2d at 1336-37. *See also Lesko*, 881 F.2d at 52 (probative value must be "so conspicuously outweighed by its inflammatory content").

The relevant question in this case is thus whether the admission of evidence of a grenade detonator at Rickman's trial so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See Romano v. Oklahoma*, 512 U.S. ___, ___, 114 S.Ct. 2004, 2012, 129 L.Ed.2d 1 (1994). At trial, the State failed to establish that the grenade detonator had any relevance to the killing of Mrs. Groseclose. Moreover, the Court finds the admission of evidence that Rickman owned a grenade detonator to be highly prejudicial because it undoubtedly created the impression that Rickman was dangerous and violent. The Court concludes that the trial court thus denied Rickman due process by allowing the jury to convict him of a capital crime based upon consideration of irrelevant and highly inflammatory evidence.

Where, as in this case, the constitutional violation is limited to the erroneous admission of particular evidence at trial, the violation is subject to the harmless-error standard of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), as modified by *Brecht v.*

Abrahamson, 507 U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). *See Satterwhite v. Texas*, 486 U.S. 249, 258-59, 108 S.Ct. 1792, 1798, 100 L.Ed.2d 284 (1988) (applying *Chapman* test to the erroneous admission of a doctor's testimony). Under *Chapman*, a federal constitutional error may be held harmless where the reviewing court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828 (adhering to *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963), in which inquiry focused on whether there was a reasonable possibility that error contributed to conviction). However, where a State court has previously conducted *Chapman* harmless error review, a federal habeas court must review the error for harmlessness under the standard of *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), that "the error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht*, 507 U.S. at ___, 113 S.Ct. at 1722 (citing *Kotteakos*, 328 U.S. at 776, 66 S.Ct. at 1253).

In the instant case, the Tennessee Supreme Court addressed Rickman's allegation that the admission of evidence about a grenade detonator was prejudicial. *Groseclose*, 615 S.W.2d at 146-47. The Tennessee Supreme Court held that the admission of such evidence did not constitute error and that, even if error had occurred, such error was "at most harmless." *Id.* at 147. Notably, the Tennessee Supreme Court's opinion does not reveal that the court conducted harmless-error analysis under *Chapman*. This Court is therefore the first court to review the error in this case and is required to conduct harmless error analysis under *Chapman* rather than under *Kotteakos*.

See Starr v. Lockhart, 23 F.3d 1280, 1292 (8th Cir.1994); *Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir.1993), *cert. denied*, 511 U.S. ___, ___, 114 S.Ct. 1631, 1633, 128 L.Ed.2d 354, 356 (1994).

Upon reviewing the error for harmlessness under *Chapman*, the Court finds this to be a rare instance in which the admission of improper evidence is both highly prejudicial and, at the same time, harmless. As the Court has recognized, Rickman's attorney elicited a substantial amount of testimony portraying Rickman as dangerous and violent, including testimony about the objectionable grenade detonator. Accordingly, the grenade detonator evidence was only cumulative of other, similarly inflammatory evidence offered by Rickman's own attorney. The admission of the grenade detonator evidence was harmless beyond a reasonable doubt. *See Chapman*, 386 U.S. at 24, 87 S.Ct. at 828.[16]

F. *Claim 6: Medication*

Rickman alleges that he was unconstitutionally administered Meprobamate and Dalmane by the State at critical stages of his trial. The State argues that the Tennessee Court of Criminal Appeals addressed Rickman's claim on post-conviction review, and that the Court of Criminal Appeals' findings that Rickman was able to

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[16] Notably, if the Tennessee Supreme Court did conduct *Chapman* harmless error review, the Court nevertheless finds the error harmless under *Kotteakos* because the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776, 66 S.Ct. at 1253. *See also Brecht*, 507 U.S. at ___, 113 S.Ct. at 1722.

functio.. normally at trial are entitled to a presumption of correctness under 28 U.S.C. § 2254(d).

Medication which is administered to a nonconsenting person "represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 229, 110 S.Ct. 1028, 1041, 108 L.Ed.2d 178 (1990). Where a state administers medication to a defendant at trial or during pre-trial proceedings, due process requires that the state show that the treatment is medically appropriate and "necessary to accomplish an essential state policy." *Riggins v. Nevada*, 504 U.S. ___, ___, 112 S.Ct. 1810, 1817, 118 L.Ed.2d 479 (1992). *See also Harper*, 494 U.S. at 227, 110 S.Ct. at 1040 (due process requires determination that medication necessary and medically appropriate). Moreover, a state may justify medically appropriate, involuntary treatment with a drug by establishing that it could not obtain an adjudication of a defendant's guilt or innocence "by using less intrusive means." *Id.*, 504 U.S. at ___, 112 S.Ct. at 1815. In *Riggins* the Supreme Court thus held that administering antipsychotic drugs to a defendant at trial was constitutional error where the lower court failed to make findings that the medication was necessary, address the reasonable alternatives to medication, or indicate the existence of safety considerations or other compelling concerns that would justify administering the medication. 504 U.S. at ___, 112 S.Ct. at 1815-16.

Upon its own initiation, the State of Tennessee decided to administer the drugs Dalmane and Meprobamate to Rickman throughout his trial. Accordingly, the burden was on the State to demonstrate that the administration of such drugs was medically appropriate, and was

essential to promote a compelling State interest. *See Riggins*, 504 U.S. at ___, 112 S.Ct. at 1817.

The Tennessee Court of Criminal Appeals addressed only the question of whether Rickman was competent to stand trial, and not whether Rickman "was unconstitutionally administered medication which affected his competency, demeanor, [or] physical and mental state throughout trial." (Pet'r Second Am.Pet., Doc. No. 128A, at 58.) Moreover, the findings of the Court of Criminal Appeals do not fully address the question of whether the State discharged its burden of demonstrating that it was medically necessary and proper to medicate Rickman. Accordingly, the State court factfindings are not entitled to a presumption of correctness under 28 U.S.C. § 2254(d)(1), (3), and (6), and this Court is required to make subsidiary findings necessary for proper resolution of this claim. *See Dick v. Scroggy*, 882 F.2d 192, 194 (6th Cir.1989); *Bragan*, 791 F.Supp. at 718.

The proof in this case is that even though Rickman and Groseclose never requested any assistance in sleeping, jail officials took them to see Dr. Wender, a psychiatrist, prior to trial. (P.C.Tr. 233.) Dr. Wender informed Rickman and Groseclose that he was going to give them Dalmane, a sedative. (*Id.*) On February 17, 1978, the day before Rickman and Groseclose's joint trial commenced, the State began administering Dalmane to Rickman and Groseclose, each at a dosage of 30 milligrams per day. (*Id.* at 183, 186, 308.) The State began administering the depressant Meprobamate to Groseclose on February 22, a few days into the trial. (*Id.* at 183.) The State began administering Meprobamate to Rickman on the following day. (*Id.* at 186; Pet'r P.C.Ex. 6.) Both Rickman and

Groseclose received the maximum allowable dosage of 1600 milligrams per day. (P.C.Tr. 183, 186, 301.) Rickman and Groseclose remained on the same dosages of Dalmane and Meprobamate throughout the trial. On March 7, a few days after the trial ended, the State began reducing the Meprobamate dosage given to both Rickman and Groseclose to 1200 milligrams each per day. (*Id.* at 184, 187; Pet'r P.C.Ex. 6.)

Where criminal defendants are thus administered drugs which cause drowsiness and may inhibit their ability to follow the proceedings, due process requires a showing that such medication is necessary to accomplish an essential state policy. *Riggins*, 504 U.S. at ___, 112 S.Ct. at 1817. Although it is evident that the amount of medication administered to Rickman was within acceptable limits, the Court is skeptical that any medical necessity compelled the State to administer the medication.[17] The Court finds that the State has failed to satisfy its burden either at trial or post-conviction review, or in these federal habeas proceedings, to show that administering mind-dulling drugs to Rickman was medically necessary and justified by a compelling State interest. Moreover, because efforts to prove or disprove actual prejudice from the record before the Court would be "futile," *Riggins*, 504 U.S. at ___, 112 S.Ct. at 1816, and the precise consequences of compelling Rickman to take mind-numbing

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[17] Significantly, Rickman and Groseclose were given exactly the same dosages of two different depressant drugs at an almost identical time, commencing one day prior to trial, and then had their dosages reduced on the same day, immediately after the trial ended.

drugs "cannot be shown from a trial transcript," *id.*, the Court is foreclosed from conducting harmless error review. *See id.*

G. *Claim 7: Shackling*

On Rickman's direct appeal, the Tennessee Supreme Court simultaneously addressed Rickman's shackling claim and Rickman's jury contamination claim[18], concluding:

> These incidents are referred to very briefly in the transcript; none are documented by affidavits; and we are of the opinion that the trial judge committed no reversible error in respect to any of the matters complained of by appellants in the impaneling of the jurors.

Groseclose, 615 S.W.2d at 148. The State argues that the Tennessee Supreme Court thus rejected Rickman's claim on the basis of a state procedural rule, described in *State v. Fowler*, 213 Tenn. 239, 373 S.W.2d 460 (1963), requiring that such a claim be supported by affidavit.

The Court rejects the State's argument for two reasons. First, the Court finds that the Tennessee Supreme Court did not make a clear and express statement that the judgment rests on a state procedural bar. Indeed, the opinion plainly indicates that the Tennessee Supreme Court addressed the claim on the merits and rejected it because the evidence did not require reversal. Second, the Court finds that *Fowler* does not require that affidavits be

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[18] *See* Section II(H), *infra*, for the Court's discussion of Rickman's jury contamination claim.

submitted for consideration of an improper shackling claim. Instead, affidavits are not required under *Fowler* if the reviewing court can resolve the claim upon review of the record. *See Fowler*, 373 S.W.2d at 464. The Court concludes that Rickman violated no firmly established state procedural rule, and that his claim is not procedurally defaulted. *See Warner*, 975 F.2d at 1213.

Turning to the merits of Rickman's claim, it is well-settled that a criminal defendant is entitled to a fair and impartial trial, including, as a general rule, the physical indicia of innocence. *Kennedy v. Cardwell*, 487 F.2d 101, 104 (6th Cir.1973), *cert. denied*, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). During trial, a defendant should not be shackled before a jury unless extraordinary circumstances are present, such as when physical restraints are required to prevent the defendant from escaping, protect those present in the courtroom, or maintain order during trial. *Id.* at 111; *Woodards v. Cardwell*, 430 F.2d 978, 982 (6th Cir.1970), *cert. denied*, 401 U.S. 911, 91 S.Ct. 874, 27 L.Ed.2d 809 (1971). Precipitously shackling a defendant when less drastic security measures will suffice is an abuse of discretion. *Kennedy*, 487 F.2d at 111. However, where a defendant is seen in shackles by one or more jurors for only a short period of time, either in the courtroom or somewhere in the courthouse, the constitutional inquiry focuses on the degree of prejudice resulting to the defendant under the circumstances. *Id.* at 109-110. The burden of proof is on the Rickman to show that his constitutional rights were violated by being handcuffed. *Id.* at 111-12.

The record establishes that Rickman was handcuffed at one point during the trial for a short period of time.

Specifically, after being seen by a doctor, Rickman was returned to court in handcuffs during a recess in the testimony of his girlfriend, Pamela Baker Lindsey. (Trial Tr. 798-808.) After Lindsey began testifying for a matter of time which is reflected in ten pages of the trial transcript, see Trial Tr. 798-808, Rickman released an "audible groan" which was recorded in the transcript by the court reporter. (*Id.* at 808.) At that point, Rickman's attorney stated, "Judge, my client's sitting over there with handcuffs on." (*Id.*) Judge Lafferty responded that he had not known that Rickman had been handcuffed, and ordered the handcuffs removed. (*Id.* at 809.) The bailiff removed the handcuffs, and Rickman's attorney continued cross-examining Lindsey. (*Id.*)

Based on the record before the Court, it appears that Rickman was handcuffed inadvertently and without justification. Although Rickman was handcuffed for only a brief period, the fact that he was handcuffed must have been obvious to the jury when Rickman suddenly groaned, thereby disrupting testimony, and the court and Rickman's attorney then engaged in the exchange which resulted in the removal of the handcuffs. Nevertheless, this Court finds that the error in briefly displaying Rickman to the jury in handcuffs was not so prejudicial as to rise to the level of a constitutional violation. When the situation was brought to the attention of the court, it was immediately addressed and remedied. As well, the Court notes that prospective jurors had been questioned on the use of handcuffs and the presumption of innocence. (*Voir dire* Tr. 67-68, 395, 1165-66.) The Court concludes that

Rickman has not sustained the burden of proof to establish that his constitutional rights were violated by the shackling.

H. *Claim 8: Jury Contamination*

As the Court has found with respect to Rickman's shackling claim, Rickman's jury contamination claim is not barred for failure to follow a state procedural rule requiring that a juror misconduct claim be supported by affidavits or evidence embodied in the transcript. *See Fowler*, 373 S.W.2d at 464. Because Rickman violated no firmly established state procedural rule, *see Warner*, 975 F.2d at 1213, this claim is now properly before the Court.[19]

A criminal defendant has a constitutional right to a fair trial before an impartial trier of fact. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). *See also Morgan v. Illinois*, 504 U.S. ___, ___, 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492 (1992) (due process demands that jury stand impartial and indifferent to extent commanded by Sixth Amendment). The Constitution does not require that prospective jurors "be totally ignorant of the facts and issues involved." A juror who has a preconceived notion about a defendant's guilt or innocence is nevertheless presumed to be impartial if the juror "can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723, 81 S.Ct. at 1643.

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[19] *See* Section II(G), *supra*, for a discussion of procedural default with respect to Rickman's shackling claim.

Where a defendant alleges that a trial has been contaminated by unauthorized contact with a juror, a hearing must be held "in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215, 102 S.Ct. 940, 945, 71 L.Ed.2d 78 (1982). *See also United States v. Zelinka*, 862 F.2d 92, 95-96 (6th Cir.1988) (defendant bears burden of proving actual juror bias). The hearing enables the trial court to determine the circumstances of the alleged contact, the effect upon any juror, and whether or not such contact was prejudicial. *See Remmer v. United States*, 347 U.S. 227, 229-30, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954), *cited with approval in Zelinka*, 862 F.2d at 94-95.

The question of the impartiality of jurors is a mixed question of law and fact which is subject to a *de novo* review by this Court. *See Irvin*, 366 U.S. at 723, 81 S.Ct. at 1643 (mixed question of law and fact requires federal court to independently evaluate *voir dire* testimony). Accordingly, the State court factual findings on this claim are not entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *See Levine*, 986 F.2d at 1514.

The transcript reveals that, while several prospective jurors waited in the jury room to be called for *voir dire*, they overheard statements about the case made by individuals who were returning to the jury room after they had been questioned on *voir dire*. Only one prospective juror actually overheard comments regarding Rickman's guilt or innocence, and she stated under oath that the comments she overheard would not affect her verdict and that she could be fair and impartial. (*Voir dire* Tr. 1054-55.) The other prospective jurors who overheard comments reported that the comments they overheard were related

only to whether the individuals speaking "had been over there" for *voir dire* and whether they had been excused from the jury. (*Id.* at 1051-58.) Notably, the one prospective juror who overheard remarks about Rickman's guilt or innocence ultimately did not serve on the jury.

The Court finds that Rickman has failed to demonstrate any bias resulting from the unauthorized contact with prospective jurors. *See Smith*, 455 U.S. at 215, 102 S.Ct. at 945; *Zelinka*, 862 F.2d at 95-96. Accordingly, the trial court properly denied Rickman's request to strike for cause all of the prospective jurors who overheard comments in the jury room.

I. *Claim 9: Ineffective Assistance Of Counsel Due To Failure To Properly Raise Issues Alleged In Habeas Petition*

Rickman asserts that any alleged failure to properly raise any of the issues in his habeas petition at an earlier point in the proceeding resulted from the ineffective assistance of counsel. To the extent that Rickman's claim addresses objections which counsel failed to make at the guilt phase of trial, the Court has already found that Livingston rendered constitutionally ineffective assistance of counsel at the guilt phase of trial.[20] However, to the extent that Rickman is alleging ineffective assistance of counsel on appeal, the Court finds that Rickman has not presented sufficient proof regarding Livingston's involvement on appeal. The Court therefore dismisses Rickman's claim.

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[20] *See* Section II(A), *supra*, for the discussion of Rickman's ineffective assistance of trial counsel claim.

J. *Claim 10: Cumulative errors*

The Sixth Circuit has recognized that errors which individually might not rise to the level of a constitutional violation may, when considered cumulatively, render a trial fundamentally unfair. *See Lundy v. Campbell*, 888 F.2d 467, 472-73 (6th Cir.1989), *cert. denied*, 495 U.S. 950, 110 S.Ct. 2212, 109 L.Ed.2d 538 (1990); *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir.1983), *cert. denied*, 464 U.S. 951, 104 S.Ct. 367, 78 L.Ed.2d 327 (1983). The Court has found that Rickman's trial was tainted by several constitutional errors. He was convicted on the basis of the false and misleading testimony of Barton Wayne Mount; received no meaningful defense from counsel; and was drugged throughout the trial. The jury then based its verdict on a "reasonable doubt" instruction which misstated the State's burden of proof. In addition, the Court found that the trial court improperly admitted evidence of a grenade detonator, and that Rickman was improperly shackled in front of the jury.

The Court concludes that even if any one of the errors found in this case does not individually require that Rickman be given a new trial, the cumulative effect of the errors violates due process and mandates issuance of the writ.

III. CONCLUSION

For the above-stated reasons, the Court finds that Rickman was denied constitutionally effective assistance of counsel at the guilt phase of trial (Claim 1); was denied due process and a fair trial because the State presented the false and misleading testimony of Barton Wayne

Mount and withheld material evidence concerning such false testimony (Claim 2); was convicted on the basis of an unconstitutional "reasonable doubt" jury instruction (Claim 3); was unconstitutionally administered medication which affected his demeanor and ability to assist with his defense at trial (Claim 6); and was denied due process at the guilt phase of trial due to the cumulative effect of these errors (Claim 10).

Accordingly, the Court hereby vacates Rickman's conviction for first-degree murder. Furthermore, the writ of habeas corpus shall issue, unless within 120 days from the entry of this order the State affords Rickman a new trial for first-degree murder.

An Order consistent with the findings herein is filed contemporaneously.

Ronald Eugene RICKMAN

v.

Michael DUTTON, Warden,
Riverbend Maximum Security Institution.

No. 3:85-0256.

United States District Court,
M.D. Tennessee,
Nashville Division.

April 25, 1994.

Henry Alan Martin, William P. Redick, Paul R. Bottei, Nashville, TN, for petitioner.

Glenn Richard Pruden, C. Mark Fowler, Nashville, TN, for respondent.

MEMORANDUM

JOHN T. NIXON, Chief Judge.

Pending before the Court is petitioner Ronald Eugene Rickman's Motion for Partial Summary Judgment (Doc. No. 211), filed on March 10, 1994, to which respondent Michael Dutton ["the State"] filed a Response and Cross-Motion for Partial Summary Judgment to Petitioner's Motion for Summary Judgment (Doc. No. 224) on March 23, 1994. On April 1, 1994, petitioner filed a Reply to State's Response to Petitioner's Motion for Summary Judgment (Doc. No. 236); and a Motion to Strike Respondent's Cross-Motion for Summary Judgment (Doc. No. 235). On April 11, 1994, the Court heard Oral Argument

from the parties on petitioner's Motion for Partial Summary Judgment. In accordance with the reasoning set forth below, the Court hereby grants petitioner's Motion for Partial Summary Judgment.

I. *BACKGROUND*

William Edward Groseclose hired petitioner Ronald Eugene Rickman and Phillip Michael Britt to murder his wife, Deborah Lee Groseclose, in June, 1977. (*State v. Groseclose & Rickman*, 615 S.W.2d 142, 144-45 (Tenn.1981).) Mrs. Groseclose was subsequently murdered and her body was discovered in the trunk of her automobile on July 4, 1977. (*Id.* at 146.) After a trial in the Criminal Court of Shelby County, Tennessee, in February, 1978, petitioner was convicted of first degree murder for his role in the death of Mrs. Groseclose.[1] (*Id.* at 144.)

Between March 1 and March 3, 1978, a sentencing hearing was conducted. (*Groseclose*, 615 S.W.2d at 144.) At sentencing, the jury was instructed that it could impose a death sentence upon petitioner if it unanimously found one or more statutory aggravating circumstances beyond a reasonable doubt. (Tr., Attach. Doc. No. 81, at 2448.) The court instructed the jury it could find as a statutory

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[1] Petitioner's co-defendants, William Edward Groseclose and Phillip Michael Britt, were also tried and convicted of first degree murder. Mr. Groseclose was sentenced to death, while Mr. Britt was sentenced to life imprisonment.

aggravating circumstance that "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." (*Id.* at 2447.) The jury was further instructed:

> "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflick [sic] a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

Id. The jury was instructed to render its decision by weighing all aggravating circumstances found against any mitigating circumstances. (*Id.* at 2448.)

Upon the instructions provided by the trial court, the jury sentenced petitioner to death. (Tr., Attach. Doc. No. 81, at 2450.) The jury based the death sentence on its finding of the following statutory aggravating circumstances:

> 1. The defendant committed the murder for remuneration. 2. The murder was especially heinous in that it involved depravity of mind. 3. The murder was committed while the defendant was engaged in the commission of rape, robbery and kidnapping.

(*Id.*)

Petitioner challenged the "heinous, atrocious, or cruel" instruction as unconstitutionally vague and overbroad. (*Groseclose*, 615 S.W.2d at 150-51.) The Tennessee Supreme Court rejected petitioner's challenge and affirmed the death sentence. (*Id.*) On March 5, 1985, petitioner filed a Petition for Writ of Habeas Corpus in federal court. (Doc. No. 5.)

On March 10, 1994, petitioner filed the instant Motion for Partial Summary Judgment. (Doc. No. 211.) Petitioner requests that this Court grant partial summary judgment on petitioner's Petition for Writ of Habeas Corpus and vacate petitioner's death sentence on the grounds that it was based on an unconstitutional aggravating factor. (*Id.*) Respondent objects to petitioner's motion, arguing that the aggravating factor at issue is not unconstitutionally vague. (Resp't's Resp., Doc. No. 224.) In the alternative, respondent argues that any vagueness in the instruction was properly cured by the Tennessee Supreme Court. (*Id.*)

II. *STANDARD OF REVIEW*

Rule 56(c) of the Federal Rules of Civil Procedure provides in part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The Advisory Committee for the Federal Rules has noted that "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Notes on Rule 56, Federal Civil Judicial Procedure and Rules (West Ed.1990).

An alleged factual dispute existing between the parties is not sufficient to defeat a properly supported summary judgment motion; there must be a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The

substantive law involved in the case will underscore which facts are material, and only disputes over outcome determinative facts will bar a grant of summary judgment. *Id.*, 477 U.S. at 248, 106 S.Ct. at 2510.

While the moving party bears the initial burden of proof for its motion, the party that opposes the motion has the burden to come forth with sufficient proof to support its claim, particularly when that party has had an opportunity to conduct discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). It is true, however, that "[i]n ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir.1962) (citations omitted).

To determine if a summary judgment motion should be granted, the court should use the standard it would apply to a motion for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511. The court must determine that a reasonable jury would be unable to return a verdict for the non-moving party in order to enter summary judgment. *Id.*, 477 U.S. at 249, 106 S.Ct. at 2511. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir.1989) (citations omitted), *reh'g denied*, (6th Cir. May 25, 1990).

III. *ANALYSIS*

Petitioner Ronald Eugene Rickman requests that the Court grant partial summary judgment on the grounds that the jury considered an aggravating circumstance which was unconstitutionally vague in its decision to sentence petitioner to death.

It is well-settled that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). *See also Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 313, 92 S.Ct. 2726, 2763, 33 L.Ed.2d 346 (1972). A capital sentencing scheme must "provide a 'meaningful basis for distinguishing the few cases in which the penalty is imposed . . . ' [and] must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " *Godfrey*, 446 U.S. at 427-28, 100 S.Ct. at 1764-65 (citations omitted).

Accordingly, when a federal court reviews a state court's application of an individual statutory aggravating or mitigating circumstance in a specific case, the court "must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer." *Walton v. Arizona*, 497 U.S. 639, 654, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990). A statutory aggravating circumstance is unconstitutionally vague "if it fails to furnish principled guidance

for the choice between death and a lesser penalty." *Richmond v. Lewis*, 506 U.S. 40, ___, 113 S.Ct. 528, 534, 121 L.Ed.2d 411 (1992). Notably, when a jury is the sentencing body "it is essential that the jurors be properly instructed regarding all facets of the sentencing process." *Walton*, 497 U.S. at 653, 110 S.Ct. at 3057. In a "weighing" state, where aggravating and mitigating circumstances are balanced against each other, "it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." *Lewis*, 506 U.S. at ___, 113 S.Ct. at 534.

If a statutory aggravating circumstance is unconstitutionally vague, a federal court must "determine whether the state courts have further defined the vague terms." *Walton*, 497 U.S. at 654, 110 S.Ct. at 3057. If the state courts have done so, the federal court must then determine whether the definitions are constitutionally sufficient, such that they "provide *some* guidance to the sentencer." *Id.* A state appellate court may thus cure the taint caused by reliance on an unconstitutionally vague aggravating circumstance by adopting an adequate narrowing construction. *Lewis*, 506 U.S. at ___, 113 S.Ct. at 534.

Under Tennessee's capital sentencing scheme, a jury at a sentencing hearing is required to weigh certain statutory aggravating factors against any mitigating factors. *See State v. Dicks*, 615 S.W.2d 126, 131 (Tenn.1981), *cert. denied*, 454 U.S. 933, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981). The jury is then instructed that it shall impose the sentence of death if the aggravating factors outweigh the mitigating factors. *Id. See also* Tr., Attach. Doc. No. 81, at 2447-48.

Accordingly, at petitioner's sentencing hearing the jury was instructed that, pursuant to Tenn.Code Ann. § 39-2404(i), "No death penalty shall be imposed by a Jury but upon a unanimous finding of the existence of one or more of the statutory aggravating circumstances. . . . " *See* Tr., Attach. Doc. No. 81, at 2447. Among the eleven statutory aggravating circumstances which the jury was instructed it could find was an instruction that "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Id.*; Tenn.Code Ann. § 39-2404(i)(5). The instruction to the jury was phrased in the disjunctive, thus allowing the jury to find the aggravating circumstance if the jury found that the offense was either "heinous" or "atrocious" or "cruel." Tr., Attach. Doc. No. 81, at 2447. The jury was further instructed: " 'Heinous' means extremely wicked or shockingly evil. 'Atrocious' means outrageously wicked and vile. 'Cruel' means designed to inflick [sic] a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless." *Id.*

Upon the instructions provided by the Tennessee court, the jury sentenced petitioner to death. *See* Tr., Attach. Doc. No. 81, at 2450. The jury based its sentence on a finding of three statutory aggravating circumstances, including that "[t]he murder was especially heinous in that it involved depravity of mind." *Id.* Petitioner challenges the constitutionality of his death sentence on the grounds that the "especially heinous" instruction upon which the jury relied to determine his sentence was unconstitutionally vague.

A. *Was The "Especially Heinous" Instruction Unconstitutionally Vague?*

In *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the Supreme Court held that Oklahoma's "especially heinous, atrocious, or cruel" instruction was unconstitutionally vague. The Supreme Court has similarly held invalid Mississippi's "especially heinous, atrocious, or cruel" instruction where "heinous" was defined as meaning "extremely wicked or shockingly evil." *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). Although the Supreme Court has not addressed whether a "depravity of mind" instruction is constitutionally permissible, this Court finds that without a further limiting instruction, such words fail to impose "any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey*, 446 U.S. at 428, 100 S.Ct. at 1765. *See also Deutscher v. Whitley*, 946 F.2d 1443, 1446-47 (9th Cir.1991) ("depravity of mind" instruction unconstitutionally vague), *cert. denied sub nom. Deutscher v. Hatcher*, 506 U.S. 939, 113 S.Ct. 374, 121 L.Ed.2d 285 (1992), *vacated on other grounds sub nom. Hatcher v. Deutscher*, 506 U.S. ___, 113 S.Ct. 367, 121 L.Ed.2d 279 (1992); *Newlon v. Armontrout*, 885 F.2d 1328, 1334-35 (8th Cir.1989) ("depravity of mind" instruction unconstitutionally vague), *cert. denied*, 497 U.S. 1038, 110 S.Ct. 3301, 111 L.Ed.2d 810 (1990).

In the instant action, the jury found as a statutory aggravating factor that "[t]he murder was especially heinous in that it involved depravity of mind." The Court finds that the "especially heinous" instruction, even as limited by the definition of "heinous" as "extremely

wicked or shockingly evil", is unconstitutionally vague under *Maynard*, 486 U.S. 356, 108 S.Ct. 1853, and *Shell*, 498 U.S. 1, 111 S.Ct. 313. Moreover, the instruction was unconstitutionally vague despite the inclusion of the term "depravity of mind," which the Court likewise finds unconstitutionally vague. Because the jury relied on an unconstitutionally vague aggravating factor in determining petitioner's sentence, such sentence must be vacated unless the Tennessee appellate courts cured the constitutional error.

B. *Did The Tennessee Appellate Courts Cure The Error In Petitioner's Sentencing?*

In a weighing state such as Tennessee, a state appellate court may cure the constitutional defect in sentencing by either relying on an adequate narrowing instruction and reweighing the aggravating and mitigating circumstances, or by undertaking harmless-error analysis. *See Lewis*, 506 U.S. at ___, 113 S.Ct. at 534; *Stringer v. Black*, 503 U.S. ___, ___, 112 S.Ct. 1130, 1136, 117 L.Ed.2d 367 (1992).

1. *Reweighing*

Petitioner argues that under Tennessee law only a jury may impose a death sentence. Therefore, when a jury has not been properly instructed, the Tennessee Supreme Court cannot reweigh aggravating and mitigating factors and itself impose a death sentence.

a. *Is reweighing permissible under Tennessee law?*

Although there is no constitutional right for a defendant to be sentenced by jury, a state may create for the defendant a constitutionally-protected liberty interest in having the jury make particular findings, including findings necessary for sentencing. *See Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980); *Cabana v. Bullock*, 474 U.S. 376, 385-86, 387 n. 4, 106 S.Ct. 689, 696-97, 697 n. 4, 88 L.Ed.2d 704 (1986). In such a case, the defendant has a "substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Hicks*, 447 U.S. at 346, 100 S.Ct. at 2229. Moreover, the defendant's "liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Id.* When a defendant is deprived of a state-created liberty interest, such deprivation may be so serious that it cannot be cured by appellate review. *See Cabana*, 474 U.S. at 387 n. 4, 106 S.Ct. at 697 n. 4 ("where state law creates for the defendant a liberty interest in having the jury make particular findings, the Due Process Clause implies that appellate findings do not suffice to protect that entitlement"). *See also Rust v. Hopkins*, 984 F.2d 1486, 1493 (8th Cir.1993) (deprivation of state-created liberty interest in having panel of judges determine proper weight to be given aggravating circumstances based on facts proven beyond reasonable doubt not curable by appellate review), *cert. denied*, 508 U.S. ___, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993).

In the instant action, several sections of the Tennessee Code Annotated applicable to this matter support petitioner's argument that he has a state-created interest in having a jury determine his sentence. At the time of petitioner's sentencing, section 39-2404(a) thus provided in pertinent part:

> Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as part of their verdict but *the jury shall fix the punishment in a separate sentencing hearing* to determine whether the defendant shall be sentenced to death or life imprisonment.

Tenn.Code Ann. § 39-2404(a) (1977) (emphasis added). Moreover, Section 39-2405(a) provided:

> In trials of first degree murder, the defendant, with the advice of his attorney and the consent of the court and the district attorney general, may waive the right to a jury to determine guilt, in which case the trial judge shall determine guilt, provided that such waiver will not affect *the defendant's right to a jury to determine punishment* if he is found guilty of first degree murder.

Tenn.Code Ann. § 39-2405(a) (1977) (emphasis added). Finally, Section 39-2406(c), which governed the Tennessee Supreme Court's authority and responsibility to review a death sentence imposed by the jury, provided:

> In reviewing the sentence of death for murder in the first degree, the Tennessee Supreme Court shall determine whether (1) the sentence of death was imposed in an arbitrary fashion; (2)

> the evidence supports *the jury's finding of a statutory aggravating circumstance or statutory aggravating circumstances;* (3) the evidence supports *the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance or circumstances so found;* and (4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

Tenn.Code Ann. § 39-2406(c) (1977) (emphasis added).[2]

On the basis of such sections of the Tennessee Code Annotated, the Court finds that petitioner has a state-created liberty interest in having a jury determine whether he should be sentenced to life imprisonment or death. A Tennessee appellate court therefore may not limit the unconstitutionally vague aggravating instruction, reweigh the aggravating and mitigating factors, and itself impose a death sentence on petitioner without thereby depriving petitioner of a right guaranteed under

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[2] Other references to a jury's determination of a defendant's death sentence were made in Tenn.Code Ann. § 39-2404(e) (1977) ("[T]he trial judge shall include in his instructions *for the jury to weigh and consider*" any aggravating and mitigating circumstances) (emphasis added); Tenn.Code. Ann. § 39-2404(g) (1977) (*"If the jury unanimously determines* that at least one statutory aggravating circumstance . . . [has] been proved by the state beyond a reasonable doubt, and said circumstance . . . [is] not outweighed . . . , the sentence shall be death") (emphasis added); and Tenn.Code Ann. § 39-2404(i) (1977) (*"No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated,* of . . . one or more of the [following] statutory aggravating circumstances. . . . ") (emphasis added).

the Fourteenth Amendment. The constitutional error in petitioner's sentence may only be cured through a new sentencing hearing before a jury, or upon a determination that such error was harmless beyond a reasonable doubt.

b. *If permissible, did constitutionally adequate reweighing occur?*

If petitioner did not have a state-created liberty interest in having a jury determine his sentence, the Tennessee Supreme Court may cure the constitutional defect in petitioner's sentence by applying a limiting construction to the vague terms and reweighing the aggravating and mitigating factors.

In *Dicks*, 615 S.W.2d 126, the Tennessee Supreme Court construed the "especially heinous, atrocious, or cruel" instruction as directed at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 615 S.W.2d at 132 (applying construction devised by Florida Supreme Court in *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973)).[3] Although the Tennessee Supreme Court has

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[3] The Tennessee Supreme Court's analysis in *Dicks* is not contrary to this Court's conclusion that the Tennessee Supreme Court may not cure the constitutional error in petitioner's sentence through reweighing because petitioner has a state-created liberty interest in having a jury determine sentencing. Notably, after applying a limiting construction to the "especially heinous" instruction, the court in Dicks merely determined that such construction was "compatible" with the trial court's instructions to the jury. 615 S.W.2d at 132. The court's analysis was thus limited to a determination that there was no constitutional error in the defendant's sentencing, and accordingly the court then affirmed the *jury's* verdict.

not further defined the term "depravity of mind,"[4] the limiting construction which the Tennessee Supreme Court adopted in *Dicks* for the "especially heinous, atrocious, or cruel" instruction has been upheld as constitutionally sufficient by the Supreme Court. *See Proffitt v. Florida*, 428 U.S. 242, 255-56, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 (1976). *See also Arave v. Creech*, 507 U.S. ___, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) (upholding construction of "utter disregard for human life" as limited to the "cold-blooded, pitiless slayer"). The limiting construction adopted by the Tennessee Supreme Court for the otherwise vague, "especially heinous" aggravating instruction is thus constitutionally sufficient.

Although the Tennessee Supreme Court adopted a constitutionally sufficient limiting construction in *Dicks*, this Court nevertheless finds that the Tennessee Supreme Court may not apply such limiting construction upon its review of this case. Indeed, if the Tennessee Supreme Court were to do so, the court would be relying on a finding that the jury failed to make at petitioner's sentencing. *See Presnell v. Georgia*, 439 U.S. 14, 15-16, 99 S.Ct. 235, 236, 58 L.Ed.2d 207 (1978) (violation of due process

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[4] *Cf. Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). In *Jeffers*, the Supreme Court upheld the Arizona Supreme Court's construction of "depraved" as being limited to the situation where "the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing." 497 U.S. at 777, 110 S.Ct. at 3100 (citation omitted).

where State appellate court determined that record established element of offense necessary to constitute aggravating circumstance, despite lack of jury finding as to such element). Although the jury was instructed that a murder was "cruel" when it was "designed to inflick [sic] a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless," the jury did not thereby find that the murder was "cruel" in this case. *See* Tr., Attach. Doc. No. 81, at 2447, 2450. Instead, the jury found that the murder "was especially heinous in that it involved depravity of mind." *Id.* at 2450.[5] This Court finds it impermissible at this juncture for the Tennessee Supreme Court to cure the "especially heinous" term by construing it as directed at the "conscienceless or pitiless crime which is unnecessarily torturous to the victim," when the jury, although instructed that it should make a finding that the crime was "cruel" if it involved an "utter indifference to, or enjoyment of, the suffering of others, pitiless," failed to render such a finding. *See Presnell*, 439 U.S. at 15-16, 99 S.Ct. at 236.

The Court finds, in the alternative, that even if the Tennessee Supreme Court could apply the "conscienceless or pitiless" limiting construction without thereby violating petitioner's rights to due process, the Tennessee Supreme Court still failed to cure the constitutional error because it did not conduct a constitutionally sufficient reweighing of the aggravating and mitigating factors in this case. An appellate court may perform a proper

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[5] "Heinous" was defined simply as "extremely wicked or shockingly evil." Tr., Attach. Doc. No. 81, at 2447.

weighing function either by disregarding an impermissible factor prior to reweighing, or by properly limiting the otherwise impermissible factor and then reweighing. *See Clemons v. Mississippi*, 494 U.S. 738, 751, 110 S.Ct. 1441, 1449, 108 L.Ed.2d 725 (1990). Regardless, an appellate court which undertakes the task of reweighing must do so in such a manner that it provides the defendant with "the individualized treatment that would result from *actual* reweighing of the mix of mitigating factors and aggravating circumstances." *Id.* at 752, 110 S.Ct. at 1450 (emphasis added).

In *Clemons v. Mississippi*, the Supreme Court thus analyzed the reweighing conducted by the Supreme Court of Mississippi. The Court noted that the Supreme Court of Mississippi had indicated that it had conducted proper reweighing by reciting the proper limiting construction of the "especially heinous" factor in its opinion. *Clemons*, 494 U.S. at 751, 110 S.Ct. at 1449-50. Moreover, the opinion at times "seem[ed] to indicate that the appellate court was reweighing the mitigating circumstances and both aggravating factors by applying the proper definition to the 'especially heinous' factor." *Id.* Nevertheless, because the Court was ultimately unable to determine whether the Supreme Court of Mississippi had conducted proper reweighing, the Court vacated the judgment of the Mississippi Supreme Court and remanded the case to the State. *Id.* at 751, 755, 110 S.Ct. at 1450, 1452.

In the instant action, this Court similarly finds the opinion of the Tennessee Supreme Court unclear as to whether the Tennessee Supreme Court performed a proper weighing function. In addressing petitioner's

challenge to his sentence on the basis of vagueness, the Tennessee Supreme Court stated:

> The contention that the statutory aggravating circumstances used against appellant[ ] are void for vagueness and overbreadth was addressed by this Court at some length in its opinion in the case of *State v. Dicks*, 615 S.W.2d 126, particularly with reference to T.C.A. § 39-2404(i)(5). The Court there sustained the constitutionality of the statute, and we are of the opinion that its application to the facts of the present case is consistent with the interpretation stated in the *Dicks* case, *supra*.

State v. Groseclose, 615 S.W.2d 142, 150-51 (Tenn.1981), *cert. denied*, 454 U.S. 882, 102 S.Ct. 366, 70 L.Ed.2d 193 (1981).

To the extent that the Tennessee Supreme Court relied on *Dicks* to affirm petitioner's death sentence, the Court finds such reliance misplaced. Indeed, in *Dicks* the court adopted a constitutionally sufficient narrowing construction, and then determined that the trial court had provided instructions to the jury which were compatible with the limiting construction which the Tennessee Supreme Court had adopted. Accordingly, no error occurred in *Dicks* because the defendant's sentence there was not tainted by unconstitutionally vague instructions.

By contrast, as this Court has already determined, petitioner's sentence was tainted because the jury at petitioner's sentencing relied on unconstitutionally vague instructions. Although the Tennessee Supreme Court may have intended to acknowledge the error, apply a limiting construction to the vague terms and then reweigh the aggravating and mitigating factors in order to cure the

error, this Court is unable to conclude from the Tennessee Supreme Court's opinion that such analysis occurred. Accordingly, the Court concludes that the Tennessee Supreme Court did not cure the constitutional error in petitioner's sentencing through proper reweighing.

2. *Harmless-error analysis*

Although the Tennessee Supreme Court failed to cure the error through reweighing, it was nevertheless open to the Tennessee Supreme Court to find the error harmless beyond a reasonable doubt. *See Clemons*, 494 U.S. at 752, 110 S.Ct. at 1450 (citing *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988)). The Court finds nothing in the Tennessee Supreme Court's opinion, however, which indicates that the court conducted harmless-error analysis. The court never acknowledged that an error occurred at petitioner's sentencing, and therefore never proceeded to analyze the record as required under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).[6] Because the Tennessee Supreme Court did not conduct its own harmless-error analysis, this Court will not speculate as to the court's judgment in this matter. *See Clemons*, 494 U.S. at 753, 110 S.Ct. at 1451 (holding insufficient "cryptic holding" which included

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[6] As the Tennessee Supreme Court has stated recently in *State v. Howell*, 868 S.W.2d 238 (Tenn.1993), *cert. denied*, 510 U.S. 1215, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994), "[I]t is important, when conducting [*Chapman*] harmless error review to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed." 868 S.W.2d at 260-61.

terms appropriate to harmless-error analysis, but which did not provide detailed harmless-error analysis); *Rust*, 984 F.2d at 1495 (holding insufficient "mere citation of *Chapman* in lieu of a plain statement summarizing [court's] analysis"). Accordingly, the constitutional error at petitioner's sentencing was not cured through harmless-error analysis.

The Court concludes that petitioner's Motion for Partial Summary Judgment on his Petition for Writ of Habeas Corpus is meritorious. Petitioner's death sentence was tainted by Eighth Amendment error when the jury gave weight to an unconstitutionally vague aggravating factor. Because petitioner has a state-created liberty interest in having a jury determine his sentence, the Supreme Court of Tennessee may not cure the constitutional error by reweighing aggravating and mitigating factors and itself sentencing petitioner. Even if petitioner is not entitled to have a jury decide his sentence, the limiting construction which the State has adopted for the vague terms may not be applied to petitioner's sentencing because the jury failed to find, as an alternative to the "especially heinous" finding, that the murder was "cruel", a factor defined for the jury with terms which were incorporated in the Tennessee Supreme Court's limiting construction for "especially heinous". In the alternative, the Tennessee Supreme Court neither conducted proper reweighing nor performed harmless-error analysis, and thereby the court failed to cure the defect at petitioner's sentencing. Because there does not exist a genuine issue of material fact with respect to petitioner's claim that his death sentence was based upon the jury's consideration of an unconstitutionally vague aggravating circumstance, the

Court grants partial summary judgment and vacates petitioner's sentence of death.

IV. *CONCLUSION*

For the above-stated reasons, the Court hereby grants petitioner's Motion for Partial Summary Judgment (Doc. No. 211); and denies respondent's Cross-Motion for Partial Summary Judgment (Doc. No. 224). Accordingly, the Court vacates petitioner's sentence of death, and remands this case to the State of Tennessee for further proceedings not inconsistent with this opinion. The Court denies petitioner's Motion to Strike Respondent's Cross-Motion for Summary Judgment (Doc. No. 235) as moot.

An Order consistent with the findings herein is filed contemporaneously.

ORDER

Pending before the Court is petitioner Ronald Eugene Rickman's Motion for Partial Summary Judgment (Doc. No. 211), filed on March 10, 1994, to which respondent Michael Dutton ["the State"] filed a Response and Cross-Motion for Partial Summary Judgment to Petitioner's Motion for Summary Judgment (Doc. No. 224) on March 23, 1994. On April 1, 1994, petitioner filed a Reply to State's Response to Petitioner's Motion for Summary Judgment (Doc. No. 236); and a Motion to Strike Respondent's Cross-Motion for Summary Judgment (Doc. No. 235). On April 11, 1994, the Court heard Oral Argument from the parties on petitioner's Motion for Partial Summary Judgment.

Consistent with the contemporaneously-filed Memorandum, the Court hereby GRANTS petitioner's Motion for Partial Summary Judgment (Doc. No. 211); and DENIES respondent's Cross-Motion for Partial Summary Judgment (Doc. No. 224). Accordingly, the Court VACATES petitioner's sentence of death, and REMANDS this case to the State of Tennessee for further proceedings not inconsistent with this opinion. The Court denies petitioner's Motion to Strike Respondent's Cross-Motion for Summary Judgment (Doc. No. 235) as MOOT.

IN THE COURT OF CRIMINAL
APPEALS OF TENNESSEE

NASHVILLE, NOVEMBER SESSION, 1983

WILLIAM GROSECLOSE and RONALD EUGENE RICKMAN,	)	C.C.A. NO. 9
Petitioners	)	SHELBY COUNTY
v.	)	HON. L. T.
STATE OF TENNESSEE,	)	LAFFERTY, JUDGE
Respondent	)	(Post-Conviction)

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OPINION FILED: **FEB 16 1994**

JUDGMENTS AFFIRMED

John K. Byers
Judge

OPINION

The appellants appeal from the dismissal of their petitions for post-conviction relief in which they seek to have set aside their convictions for murder in the first degree and punishment of death.

Both of the appellants basically claim they had ineffective assistance of counsel at trial and cite a plethora of occurrences at trial upon which they rely as indicative of this. Additionally, they contend they were incompetent at the time of the trial because they were being administered medication which made them unable to understand the proceedings against them and participate meaningfully therein.

After an evidentiary hearing, the trial judge held against the appellants on all of their contentions, and the appellants say the evidence preponderates against his findings.

The judgments are affirmed.

A detailed recitation of the operative facts of the crime as shown in the convicting trial is not necessary or particularly desirable in the review of a post-conviction case. However, to place the appellants' complaints herein in perspective, we note that the Supreme Court in reviewing this case said, "The murder was one of the most atrocious and inhuman conceivable," and "There was overwhelming proof of the guilt of all three of the defendants."[1] *State v. Groseclose*, 615 S.W.2d 142 (Tenn. 1981).

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[1] A third defendant named Britt received a life sentence and did not appeal the conviction.

Clear evidence at trial showed that the murder was precipitated by Groseclose's hiring of Rickman and others to murder his wife. Rickman and Britt went to the Groseclose home on the morning of the crime, entered through a door left open by Groseclose, and raped the woman. Rickman choked her until she was unconscious, then stabbed her, and placed her supposedly dead body into the trunk of her vehicle. Rickman and Britt drove the vehicle to a public library, and despite their knowledge that the woman was alive, as reflected by her cries for help which they heard, left her in the trunk of the vehicle where she died from the effect of the extreme heat. Death was attributed to systemic hyperthermia which amounted to her cooking to death, as characterized by the trial judge.

Rickman and Groseclose claim they were incompetent to stand trial because during the course of the trial they were being administered drugs which made them unable to comprehend what was taking place. The record shows each of the appellants was being given medication because of severe anxiety and that they were being given a sleeping pill in the evening.

The physician who prescribed this medication testified it was given within the accepted limit for people under extreme anxiety and that he observed nothing to indicate that the appellants were in any way impaired. The attorneys who represented the appellants at the convicting trial testified that they saw nothing to indicate the appellants were unable to comprehend what was taking place or to rationally assist them.

A pharmacologist, called by the appellants, testified that although this medication might tend to make a person more slow in comprehension, it would not make them unable to function normally or unable to understand what was taking place. The evidence does not preponderate against the finding of the trial judge that the appellants were competent to stand trial. We also conclude that this evidence does not even approach those circumstances held to require a trial judge to conduct further inquiry on the issue. *See, e.g., Drope v. Missouri,* 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Pate v. Robinson,* 383 U.S. 375, 86 S.Ct. 836, 18 L.Ed.2d 815 (1966).

Groseclose's contentions.

A. Jury Selection.

(1) Witherspoon issue – Groseclose contends his counsel was incompetent because he relied upon his co-defendants' lawyers in questioning the jurors, that he made no request to submit questionnaires to prospective jurors for background information, that he made no request for individual voir dire of the prospective jurors, that no attempt was made to rehabilitate prospective jurors who were excused because they opposed the death penalty, that his lawyer failed to exercise all of his peremptory challenges, and failed to challenge the composition of the jury.

In the trial, there were three defendants and four lawyers. In the selection of the jury, Britt's lawyer conducted the major portion of the voir dire of the jury, which included the questioning of jurors in the area of their opposition to the death penalty. In addition, the trial

judge questioned the prospective jurors who had voiced an objection to the death penalty to determine if they were indeed unalterably opposed to the death penalty.

On direct appeal, the Supreme Court found that no juror excused for cause was erroneously excused.

Groseclose's lawyer was of the view it was not necessary to get into extensive voir dire of the jury after Britt's attorney and the court had done so. Groseclose contends, however, that had defense counsel hypothesized a set of facts different from the facts in this case, he might have been able to rehabilitate the prospective jurors who were excused for cause. Groseclose characterizes this hypothesizing as a popular method of defense counsel to explore the qualifications of a prospective juror in a death penalty case.

Though this may be a "popular" method of defense counsel, the issue was whether the prospective jurors would be able to consider the entire range of punishment in the case they were trying. We are unwilling to say counsel is incompetent for failure to ask a question of doubtful probity which is based upon an hypothesis not present in the case and is irrelevant to the matter in question. We are cited to no case which has held such hypothetical questions to be either permissible or required.

(2) En banc jury selection – Groseclose complains that his attorney made no independent motion for individual voir dire of the jury. He admits that Britt's attorney made such a motion and it was denied. We cannot fault counsel for not making a motion which would be futile. The question is whether the accused had a fair and

impartial jury. There is nothing in the record before us to suggest he did not have a fair and impartial jury, and there is nothing to suggest the jury was irrevocably committed to impose the death penalty. Indeed, this jury did not inflict the death penalty on Britt, who participated in the murder of Groseclose's wife and who was tried in this case with the appellants.

(3) Failure to exercise all peremptory challenges – Groseclose claims his lawyer was incompetent because he failed to exercise all of his peremptory challenges and thus foreclosed the possibility of raising issues on the matter of jury selection on appeal.

If there were in fact some incompetent jurors who sat on the convicting trial, Groseclose did not show this to be the case in the hearing of this post-conviction petition.

He has not shown any right lost to him by the attorney's failure to exhaust his challenges. We are not disposed to invalidate a trial merely on a possibility of some loss to the petitioner.

Furthermore, when an attorney has obtained what is to him, in the exercise of his professional judgment, a jury as favorable as he believes he can obtain, he would be foolish to exercise a peremptory challenge, where he had no reason to raise an appellate issue, and be faced with an unknown quality in the venireman called to replace the challenged juror.

(4) Failure to challenge the composition of the jury – Groseclose claims his counsel was ineffective because he failed to challenge the composition of the jury. The record shows that none of the lawyers in this case had

any reason to challenge the makeup of the venire called in this case. Groseclose, in the post-conviction proceeding, does not suggest or show any defect therein either. Competent counsel is not rendered incompetent for not doing foolish things. The competent practice of law presupposes that an attorney will make rational decisions upon the facts as they exist. Competency does not require counsel to jump through hoops merely because the hoops may be present.

B. Guilt or innocence phase.

Groseclose testified that his trial lawyer failed to make an independent investigation for the purpose of interposing a defense. The attorney testified he interviewed several witnesses suggested by Groseclose and several not suggested by him. At the post-conviction proceeding, Groseclose testified he wanted the lawyer to call witnesses to show he was not present when his wife was killed. The state's evidence did not suggest Groseclose was present at the time of the offense. The evidence showed he purposely was at the naval base where he had been previously stationed. The evidence which Groseclose wanted shown would not have presented an alibi defense. The lawyer could find no viable defense for Groseclose, and Groseclose did not show in the post-conviction hearing that one existed.

Groseclose further contends the lawyer did not attempt to impeach a witness who testified that after the killing one of the codefendants had possession of rings owned by the victim. He claims these rings were sold prior to her death. Even if counsel could have impeached

the witness, we do not see, given the massive evidence of guilt, that the failure to do so prejudiced Groseclose. Groseclose raised other issues under the category which dealt with the medication. We have previously answered this.

Basically the thrust of Groseclose's complaint under this heading dealt with the tactical handling of the trial. There is no showing that this amounted to incompetency of counsel.

C. Penalty phase.

Groseclose claims his lawyer was incompetent because he did not present any mitigating circumstances in the punishment phase of the trial. The record shows the attorney called witnesses to testify favorably for Groseclose. Groseclose complains because the lawyer did not put members of his family on the stand. Particularly, Groseclose claims he wanted his mother called. This record indicates Groseclose's mother was terminally ill at the time of this trial and unable to attend. She has since died. Significantly, Groseclose, in this post-conviction proceeding, did not show there were any mitigating factors which could have been shown that were not shown. He only argues that the lawyer should have called witnesses from such groups as Tennesseans Against the Death Penalty, Southern Prison Ministries, and the American Civil Liberties Union to show sociological and philosophical reasons why the death penalty should not be inflicted. Such evidence is not admissible. *State v. Johnson*, 632 S.W.2d 542 (Tenn. 1982).

D. Post-trial neglect.

Groseclose claims the failure of his lawyer to render adequate post-trial assistance should invalidate the verdict in this case. It appears that he failed to preserve his trial notes and did not order that closing argument be transcribed. Nothing in this record shows anything helpful in the notes or anything prejudicial in the argument. Even if counsel was incompetent in the post-trial function, Groseclose would not be entitled to a new trial on that basis.

If defects occurred, the delayed appeals provision of our statute would grant relief to Groseclose. Furthermore, other counsel perfected the direct appeal in this case, and there is no showing in this post-conviction hearing that Groseclose was deprived of any right or prejudiced by the action of his original lawyer.

E. Failure to grant a continuance because of the lack of a record of the convicting trial.

Groseclose says the post-conviction hearing should have been continued because he was not furnished a copy of the transcript of the convicting trial.

The original trial was transcribed and filed with the Supreme Court at Jackson. The transcript was available at Jackson for review by the attorney representing Groseclose at the post-conviction proceeding. We find nothing in this record to show that Groseclose was prejudiced by the ruling of the trial judge on this motion.

Groseclose further claims he was prejudiced by the failure of the state to file a responsive pleading. The

record does not support this contention and it is without merit.

Rickman's contentions.

A. Investigation and preparation.

(1) Rickman says his attorney was incompetent because he waived the preliminary hearing and thus lost any opportunity to use this vehicle for discovery. The lawyer testified he waived the preliminary hearing because the only witnesses present were police officers, and the news media were in attendance. The lawyer was of the opinion that the publicity from a hearing would outweigh the dubious discovery benefit. We are of the opinion this was a legitimate tactic by the lawyer and does not indicate incompetence.

(2) Rickman contends his lawyer never discussed the case with him or made any effort to investigate the charges against him. The lawyer testified he interviewed Rickman for several hours and discussed the witnesses listed as state's witnesses. Additionally, the lawyer left with him a nine page copy of a confession given by Rickman to officers and asked him to determine what parts were true and what parts were false. A week later, Rickman told the lawyer the entire statement was true.

From this time the lawyer, with Rickman's approval, attempted to negotiate a plea of guilty. When it became obvious this case would be tried, the lawyer obtained from the state the substance of the testimony to be given by two of three key state's witnesses. The lawyer had the confession of Britt who was a codefendant. Rickman has

not alleged that there were witnesses who could have exonerated him, nor did he show in the post-conviction proceeding that there existed any witnesses who could give him a defense. Beyond this, the lawyer testified the state granted him informal discovery of the case against his client within the rules.

The federal courts have held that where informal discovery is obtained, the petitioner must show some prejudice resulting from the lack of further investigation. *See, e.g., Beran v. United States,* 580 F.2d 324 (8th Cir. 1978). Rickman has not shown any prejudice in this matter and cannot prevail on this issue.

(3) Rickman says his lawyer was incompetent because he did not investigate the possibility of entering a defense of insanity.

The record shows the lawyer asked for, and obtained, a psychiatric evaluation of Rickman prior to trial. The most we find in this record is that Rickman was found to be competent to stand trial.

Rickman complains that his lawyer did not obtain copies of reports from a mental evaluation done of him at age 16 at an institution in South Carolina. Significantly, Rickman in his post-conviction proceeding makes no claim of mental incompetence at the time of the murder. Furthermore, if the record in South Carolina would show him to have been incompetent it was available to him in the post-conviction proceeding as it was prior to the original trial. Rickman has failed to show any prejudice in the matter of his mental competence.

B. Jury selection.

The same complaints in this area were made by Groseclose, and what we said in response thereto is applicable to Rickman's complaint about the jury selection process.

C. Penalty phase.

(1) Defense witnesses – Rickman complains that his lawyer did not call any witnesses to show mitigating circumstances, at the penalty phase. More significantly, he complains that no effort was made to show he had previously used mind-altering drugs and had previously had a psychological examination at an institution in South Carolina.

Rickman never claimed, either in the trial of this case or in the post-conviction hearing, that he was using drugs at the time the offense was committed or that the examination done in South Carolina would show he was mentally incompetent. If indeed the psychological report would show incompetency, Rickman could have introduced the report in the post-conviction hearing to support his claim. Rather than do this, he asks that we grant a new trial on the supposition that it is possible such defense is viable. This we are unwilling to do.

(2) Rickman's testimony – a more serious issue raised by Rickman involves the testimony which his lawyer elicited from him during the punishment stage concerning his past. The period of criminal activity covered by this inquiry went back to Rickman's young years. The lawyer had Rickman testify about a great number of

previous crimes he had committed, about his use of drugs, and about his association with a disreputable motorcycle gang. In the course of discussing the motorcycle gang, Rickman testified about acts of violence and intimidation in which he participated. None of this testimony would endear Rickman to the jury.

In the post-conviction hearing, the lawyer testified that after the state's evidence was completed in the guilt phase, there was no doubt that Rickman and the others were going to be sentenced to death. Based on this judgment, the lawyer decided that the only thing he could do in an effort to save Rickman was to show his sordid past. The lawyer testified that there was a last ditch effort to persuade the jury that Rickman was abnormal, that he had had a more difficult childhood and history than the normal person in the hope that this would gain sympathy with the jury and avoid a sentence of death.

This approach by the lawyer may very well be described as desperate, with little hope of success. However, when viewed in the light of the overwhelming evidence of guilt of a murder described as "one of the most atrocious and inhuman conceivable," what in hindsight might appear desperate and unlikely of success becomes less startling in the face of the hopeless cause with which the lawyer was faced.

For the most part, those prior crimes which were documented could have been shown by the state as aggravating circumstances. The fact is there are no mitigating circumstances available to Rickman to show. We are therefore not willing to set aside the verdict in this case on this basis, because there is no showing that it is

reasonable to assume that a different result might have occurred had these tactics not been used.

D. Post-trial neglect.

We responded to this issue in discussing the same complaint by Groseclose.

E. Administering drugs.

We responded to this issue above.

In summary, what this record reveals is that Groseclose, Rickman, and Britt were without question guilty of an atrocious murder of an innocent person, that the crime was committed by Rickman and Britt for hire, and that Groseclose hired the others to kill his wife. The appellants have alleged a great number of deficiencies in their attorneys at the convicting trial. In the issue on appeal, neither has asserted any actual prejudice which resulted. They talk rather of possibilities. In the evidence presented by the appellants at the hearing on the post-conviction petition, neither of them showed that any evidence could have been obtained to support these allegations.

In effect, the appellants ask this Court to invalidate these convictions on suppositions which are not supported by the evidence.

Alleged deficiencies of counsel are not sufficient to obtain the setting aside of a convicting trial. The petitioners must show that the conduct of his attorney amounted to incompetency under the *Baxter v. Rose* decision, 523 S.W.2d 930 (Tenn. 1975), which follows the

United States Supreme Court rule on competency of counsel; they must also show they were prejudiced by the action of their attorney. The petitioners have failed in both of these respects.

The evidence does not preponderate against the finding of the trial judge and we affirm his judgment herein.

/s/ John K. Byers
John K. Byers, Judge

CONCUR:

/s/ Robert K. Dwyer
Robert K. Dwyer, Judge

/s/ Lloyd Tatum
Lloyd Tatum, Judge

IN THE SUPREME COURT OF TENNESSEE
SITTING AT KNOXVILLE

For Publication

February 17, 1981

STATE OF TENNESSEE, Plaintiff-Appellee, vs. WILLIAM EDWARD GROSECLOSE and RONALD EUGENE RICKMAN, Defendants-Appellants.	Shelby Criminal No. 5 Hon. L. T. Lafferty, Judge

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OPINION

Appellants William Edward Groseclose and Ronald Eugene Rickman appeal from their convictions of murder in the first degree and a sentence of death pursuant thereto. A codefendant who was tried and convicted with

them, Phillip Michael Britt, was sentenced to life imprisonment. His case is not involved in the present appeal.

After careful consideration of the assignments of error made on behalf of appellants and of the entire record, we are of the opinion that the verdict and sentence are sustained by the evidence and that no reversible error was committed at the very lengthy trial out of which these appeals arise.

Appellants were convicted for the murder of Deborah Lee Groseclose on or about June 29, 1977. The victim was the wife of appellant William Edward Groseclose.

Jury selection began in this case on February 13, 1978, and was completed on February 17. After pleas of not guilty by all defendants, trial commenced on February 18, 1978, and was concluded on February 28. The sentencing hearing consumed from March 1 through March 3. None of the defendants testified before the jury at the guilt phase of the hearing. The State presented thirty-nine witnesses during that portion of the trial. The resulting record was voluminous, and there were, of course, some discrepancies and conflicts in the testimony. There was material evidence presented to the jury, however, to support the following statement of the essential facts.

Mr. and Mrs. Groseclose were married in April, 1975. They had been experiencing marital difficulties for some time prior to her death. They had been separated for about two weeks during a part of which Mr. Groseclose visited his mother in Kingsport, Tennessee. Mr.

Groseclose was twenty-nine years of age in June 1977; his wife was twenty-four. He had served in the Navy for several years. Prior to his wife's death he had been employed in the Navy Recruiting Service. It was there that he had become acquainted with several of the other persons involved in the homicide.

Mr. Groseclose was discharged from his employment on June 16, 1977, because of serious irregularities in his enlisting of recruits. His wife was employed as a receptionist for a group of physicians. Shortly after their marriage Mr. Groseclose had obtained a substantial amount of insurance on the life of his wife.

For several weeks prior to the actual homicide, Mr. Groseclose planned the death of the victim. His motive may have been apprehension that she was about to sue him for divorce, desire to obtain the life insurance proceeds, or interest in another woman. There is evidence in the record to suggest all of these as possibilities. In all events, he contacted one of his former recruits, Barton Wayne Mount, in an effort to employ someone to murder Mrs. Groseclose. Mount placed him in touch with his codefendant Britt, a nineteen-year-old boy. Britt contacted his former brother-in-law, appellant Rickman. Ultimately, with the knowledge and participation of Britt and Mount, Rickman agreed to perform the act for a specified and negotiated price. Britt was to share in the proceeds. Groseclose also promised to reward Mount thereafter.

Mount was indicted with the other three defendants. His case, however, was severed and he testified for the State at the trial. His testimony was devastating to all the defendants. Although he was cross-examined at length by

counsel for all defendants, his testimony clearly showed that the homicide was committed by Rickman and Britt on behalf of and after being procured by Groseclose.

Also testifying for the State was Pamela Baker Lindsey, who at the time of the homicide was living in an apartment with Rickman and with one Donnie Tatum. Mrs. Lindsey was never indicted in connection with the death of Mrs. Groseclose. In her testimony, she described in detail a meeting between the participants and Mr. Groseclose, as well as the planning and the aftermath of the murder. Shortly after it was committed, she assisted Rickman in shaving his hair, altering his beard, and materially changing his appearance. She and Rickman fled to Oklahoma where Rickman was arrested about one week after the body of Mrs. Groseclose was discovered.

The murder was one of the most atrocious and in – human conceivable. Although there are different versions and conflicting evidence on the point, it appears that there was a plan for Rickman to accost Mrs. Groseclose on the afternoon of June 28 and to frighten her to the point that she would report the incident to police. She was then to be murdered on the next day, the plan being that suspicion would be diverted from her husband by the previous incident. Whether planned or not, this in fact occurred, and Rickman approached Mrs. Groseclose on the parking lot near the place of her employment. When she would not talk with him, he followed her home in another automobile, greatly alarming her. There is no question but that she was frightened and that she did report the incident to the police in the evening of June 28, 1977. She also reported it to other persons, including her

husband, apparently having no suspicion of his involvement.

According to plan, Mr. Groseclose left his residence early on the morning of June 29, taking his infant son with him. He left the back door to the residence unlocked, although he had previously supplied a key for use by the murderers in the event they had difficulty obtaining access to the house. Rickman and Britt went to the residence at about 5 or 5:30 in the morning and waited in a workshop near the home until Mr. Groseclose left. They then entered the house. Each had sexual relations with Mrs. Groseclose. They then permitted her to bathe and dress, during which process Rickman advised her that there was a "contract" on her life. According to the phrase used by both Britt and Rickman, the terrified woman "plea bargained" with her attackers and offered to try to get money for them. This offer was refused, and Rickman proceeded to strangle Mrs. Groseclose into unconsciousness. Whether Britt participated in this act or not is unclear from the proof. He said that he did not, although at one point he admitted having held the hands of Mrs. Groseclose briefly while she was struggling with Rickman, who had seized her from behind. In all events, apparently still detecting a pulse after the victim had been rendered unconscious, Rickman stabbed her three or four times in the back near the spinal cord. Thinking their victim to be dead, Rickman and Britt then placed her body in the trunk of her automobile and drove the vehicle to a parking lot adjacent to the main Memphis Public Library. During this trip, Rickman became aware that the victim was not dead, and in a statement later introduced he said that he and Britt could hear her cries for help

from the trunk. Britt denied this and said that he could not recall having heard any outcry from the victim.

In all events, the victim was left locked in the trunk of her automobile in the broiling sun from about 9 a.m. on June 29 until her badly decomposed body was discovered therein during the early afternoon of July 4 – a period of some five days. Medical testimony revealed that the injuries which had been inflicted on Mrs. Groseclose by Rickman would not have been fatal and that she died from the excessive heat in the trunk of the automobile (systemic hyperthermia).

Mr. Groseclose reported his wife missing during the day of June 29 and went through a pretense of searching for her during the next several days. The perpetrators, Britt and Rickman, met with him and told him that their mission had been accomplished. He had withdrawn funds from a bank account on the night of June 28 in order to make a partial payment to Rickman and was to pay the balance when he collected the proceeds of the insurance policies on his wife.

Rickman and Pamela Lindsey had been living in an apartment rented by one Donnie Tatum. Police began an extensive investigation into this homicide after the ghastly discovery of the victim on July 4. They interviewed Tatum and Mount, and the entire scheme came to light. Within a week after the homicide most of the principal participants were in custody. Tatum gave a detailed statement to the police, which was consistent with that later given by Mrs. Lindsey and by Britt and generally consistent with one also given by Rickman. After a full suppression hearing, the statements of both Britt and

Rickman, in redacted form, were admitted into evidence and read to the jury. Later, at the sentencing hearing, their redacted statements were read in full.

Further discussion of the facts is unnecessary, except as relevant to specific assignments of error. There was overwhelming proof of the guilt of all three of the defendants, and the assignments of error challenging sufficiency of the evidence are overruled.

Also without merit is an assignment challenging the admissibility of two photographs of the body of the victim on the ground of their gruesomeness and prejudicial effect. These were apparently polaroid snapshots, taken at distance of several feet, and show very little detail, other than the actual location of the body. Their contents do not approach the gruesomeness of the oral testimony given by several eyewitnesses, and they were probative primarily to show the position of the body in the vehicle at the time of its discovery. The photographs were relevant, and their probative value was considerable. We find no error in their admission.

Another issue dealing with the proof pertains to the admission in evidence of a grenade detonator through the testimony of Pamela Lindsey. Mrs. Lindsey testified that this detonator was in the possession of Rickman prior to the homicide. Upon objection by counsel for the defense to the admission of the exhibit, the District Attorney stated that its relevance would become apparent when Donnie Tatum testified as a witness.

Tatum was present at the trial and waited for a considerable time before being called as a witness. When he was called, however, defense counsel objected at the

outset to any evidence given by him on the ground that he had been granted immunity by the grand jury and that this fact was not made known to counsel prior to the trial. In the face of this objection, the State agreed not to use Tatum as a witness. His signed statement to the police was later filed for the record, and, like the testimony of Mount, it was extremely detrimental to all three defendants. The exclusion of Tatum as a witness was, therefore, of material benefit to the defense. None of the defendants, however, moved to strike the grenade detonator from the record or the testimony of Mrs. Lindsey pertaining thereto. To the contrary, counsel for defendants cross-examined several prosecution witnesses about the grenade detonator, and it was referred to thereafter on several occasions without objection. The initial objection was never renewed, nor was it mentioned in the motion for new trial after verdict.

It is apparent from an examination of Tatums' statement that had he been permitted to testify, the grenade detonator would have been material, and testimony concerning it would have been detrimental to Rickman. In the statement, Tatum said that when he was first interviewed by the police in his apartment after the homicide Rickman secreted himself in an adjoining closet with the detonator and threatened to destroy himself, Tatum and the investigating officer by activating the detonator if Tatum gave any damaging information to the police. All of this testimony was excluded from consideration by the jury. There was no reversible error in the original admission of the detonator and certainly no prejudicial error to the defendants as a result of the subsequent trial developments. If any error initially occurred in the admission of

the detonator, it was at most harmless and must be deemed waived by failure to renew the objection at an appropriate time. Parenthetically, on the sentencing hearing, Rickman admitted possessing the detonator and demonstrated its potential use to the jurors.

Appellants assign as error testimony by a police officer implicating Groseclose after statements given by Britt and Rickman had been ordered redacted and all references in each to any codefendant deleted.

The statement by the officer was merely an introductory remark, to which objection was immediately made and sustained. Cautionary instructions were given to the jury. The statement came late in the presentation of the State's proof, long after both Mount and Mrs. Lindsey had testified, directly implicating all of the defendants. Under the circumstances, therefore, the statement by the officer was at most a technical error and was merely cumulative and repetitive to much more damaging testimony on the same subject which had already been admitted without objection. The assignment of error is overruled.

Appellants complain of the voir dire examination of the jurors and their qualification with respect to the death penalty. We have examined the record, however, and we do not find that any error was committed by the trial judge in excusing jurors for cause. We further note that appellants did not exhaust their peremptory challenges, and there is no basis for reversal with respect to the examination of the jurors.

Likewise without merit are assignments complaining of failure of the court reporter to transcribe the final

arguments of counsel. Counsel representing appellants on appeal were not present at the trial. Trial counsel, however, fully approved the transcript of the record on appeal and must be deemed to have approved its abridgement. In the absence of supporting affidavits or other evidence that prejudicial or reversible error occurred during the final summations of counsel, we cannot sustain this assignment.

Equally without merit is the complaint that the trial judge failed to complete and to supply a report to the clerk of this Court concerning the defendant Britt. Such a report is required in all cases where the death penalty is submitted to the jury for consideration, whether imposed or not. *See* Rule 47 of the rules of this Court.

In the present case, reports concerning Groseclose and Rickman were included in the record on appeal, as required by the Rule, but since Britt's case is not involved here, a report concerning him was not included. Such a report was prepared by the trial judge, however, and transmitted to the clerk of this Court under date of April 4, 1978, in compliance with the rule. Accordingly the assignment of error regarding the absence of this report is overruled.

Appellants have assigned errors regarding the jury instructions, but from an examination of them we are of the opinion that the instructions given closely followed the Tennessee statutes which the Court has previously held constitutional. One of the principal complaints made in the brief of appellants was the failure of the trial judge to define the term "mitigating," but we are of the opinion that this is a word in common usage and certainly not a

"legalism" beyond the understanding of ordinary citizens composing a jury panel.

Appellants also complain of some incidents which occurred during the impaneling of the jury, such as contact of prospective jurors with persons who had already been excused from the panel and the viewing by jurors of the appellants in handcuffs. These incidents are referred to very briefly in the transcript; none are documented by affidavits; and we are of the opinion that the trial judge committed no reversible error in respect to any of the matters complained of by appellants in the impaneling of the jurors.

One of the principal assignments of error is that alleged disproportionate sentences given to appellants as contrasted with the sentence of life imprisonment given to their codefendant Britt. We have carefully reviewed the record in this regard, and we are of the opinion that there was material evidence in the record justifying the discretion exercised by the jurors in this regard.

The very essence of the statutory procedure under which the death penalty may be imposed is the requirement that the jurors consider each case separately and individually, and that they consider aggravating and mitigating circumstances in each case. Their decision, of course, is not to be reached in an arbitrary manner, but, on the other hand, the jury is certainly not required to impose the death penalty in every case involving a conviction of murder in the first degree.

The jury found aggravating circumstances against both Groseclose and Rickman which are clearly sustained by the proof, including the fact that this was a murder for

hire and that it was particularly brutal and atrocious. In the case of Rickman, the evidence showed a substantial record of prior criminal activity. No mitigating circumstances were proved on his behalf. Groseclose had no prior criminal record, but this was the only mitigating factor established in his case. Witnesses whom he called, supposedly to attest to his general character and reputation, showed only that he had been well liked in his work at the naval base in Memphis. These witnesses, however, further said that appellant Groseclose had become unreliable and undependable in his work, that his general performance was unsatisfactory, and that he was discharged from his employment for that reason.

In his report to this Court summarizing the cases, the trial judge made the following comment with respect to appellant Rickman:

> "Due to the facts that developed in this lawsuit the defendant's guilt was without question. The manner of the death of the victim in this case was the second worst manner this Court has seen in 15 years experience in criminal cases. This Court has no quarrel with the jury's decision as to the punishment for this defendant."

Earlier in the report, in describing the extent of harm or torture to the victim, the trial judge said:

> "The manner of death was atrocious, after raping and stabbing the victim, she was choked unconscious, placed in the trunk of a car on

> 6/29/77, and died due to systematic hypothermia[1] (literally cooking to death). Body was found 7/4/77."

As to appellant Groseclose, the trial judge gave the same description of the manner of death and made this comment:

> "There is no doubt in this Court's opinion that the defendant intended to kill his wife as shown by the proof. This defendant willfully, maliciously and intentionally set in motion the plan whereby his wife met a most atrocious death. The jury was justified in its decision as to the punishment for this defendant, although he was not physically present."

We find that the record fully supports these conclusions by the trial judge.

On the other hand, while Britt legaily was as fully implicated in the homicide as was Rickman, there is evidence which, if accepted by the trier of fact, would establish that he did not physically engage either in the strangulation or the stabbing of the victim. He was only nineteen years of age with no prior criminal record. There was substantial evidence, both lay and expert, that he was subject to domination and influence by the older, more mature and more hardened criminal, Rickman. One of the statutory mitigating circumstances in this state is that the act was committed under duress or under the "substantial domination of another person." T.C.A. § 39-2404.

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[1] Apparently a typographical error for "systemic hyperthermia."

Further, as noted by the trial judge in his report, throughout the trial, and particularly at the sentencing hearing, Britt, unlike his codefendants, manifested remorse and regret over the incident. He testified that his guilty knowledge weighted heavily upon his conscience, and that when he was taken into custody on July 10 he freely and voluntarily disclosed all of the circumstances surrounding the death of the victim, including his own participation therein. The jury saw and observed his manner and demeanor in testifying, as contrasted to that of the appellants, both of whom, throughout most of the trial, denied any implication whatever. A trier of fact could reasonably accept the testimony which Britt offered. Further, there was expert evidence offered on his behalf that he is subject to a program of rehabilitation and could benefit therefrom, but no such evidence was offered by either of the appellants.

Britt testified that he had not planned to be present at the time of the homicide and that he only accompanied Rickman upon the latter's orders and directions. When Rickman first testified at the sentencing hearing, he denied any participation whatever in the events of June 29, 1977. Later, however, at the conclusion of the sentencing hearing, Rickman again took the stand. This time he testified that the written statement which he had earlier given investigating police was substantially correct and that he did in fact kill the victim. On this occasion, he confirmed Britt's testimony that the latter was present only on the orders of Rickman, to assist in the furnishing

of transportation.[2] The jury was, of course, entitled to accept or reject all or part of Rickman's contradictory testimony, but at least at this point in the trial he did attempt to minimize the role which Britt had played.

In his report to this Court, the trial judge stated that there was evidence from which the jury could have found several mitigating circumstances, including absence of any prior criminal record, duress or domination by another person, youth of the accused and contrition and remorse. He commented upon the sentence of the jury as follows:

> This trial jury under the evidence in this lawsuit could have easily found death as punishment. The jury evidently took into consideration the defendant's age (19) and his domination or influence by codefendant, Ronald E. Rickman. This trial Court has no quarrel with the jury's decision as to this defendant."

We are of the opinion that the jury did not act arbitrarily or capriciously in imposing the death penalty on appellants while sentencing Britt to life imprisonment. The case of each of the accused persons had to be considered separately and on its own individual merits. Each of the defending parties was allowed very wide discretion in offering evidence at the sentencing hearing. The testimony ranged over a wide area, including philosophical

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[2] On this occasion Rickman testified that he had known Mrs. Groseclose previously and that she and others had supplied him with drugs for the use in illegal narcotics sales. He also claimed that she had had an illicit love affair with him. This testimony was strongly challenged on cross-examination and was never corroborated by any other evidence.

and religious topics, as well as the personal history of each defendant. The only limitation which the trial judge imposed involved a detailed examination of the District Attorney and his staff by counsel for appellants, out of the presence of the jury, with respect to the refusal of the District Attorney to engage in plea bargaining in these cases and as to his policies in the handling of similar cases. No issue for jury consideration was developed at this portion of the sentencing hearing, in our opinion, but each appellant was given almost unlimited freedom to introduce any other mitigating evidence which he desired.

The remaining assignments of error by appellants challenge the constitutionality of the Tennessee death penalty statute in a number of respects. These issues have been previously considered and rejected by this Court in other cases. For example, appellants contend that the statutes are unconstitutional in that they do not require notice to the accused of the particular aggravating circumstances upon which the State will rely at trial. Both in *State v. Berry*, 592 S.W. 2d 553 (Tenn. 1980), and in *Houston v. State*, 593 S.W.2d 267 (Tenn. 1980,[3] this contention was considered and found to be without merit. In *Houston, supra*, most of the remaining contentions now made with respect to the alleged vagueness of the statutes, mandatory imposition of the death penalty, double jeopardy and use of hearsay evidence at the sentencing hearing were considered and rejected. Likewise found to be without merit was the contention that the statutes limit the mitigating circumstances which the jurors may consider or

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[3] *Cert. denied*, 101 S. Ct. 251 (1980).

deprive them of any other accurate sentencing information. *See also Cozzolino v. State*, 584 S.W.2d 765 (Tenn. 1979).

In the present case the appellants challenge the efficacy of Rule 47 of this Court to afford a meaningful or realistic comparison of cases arising under the death penalty statutes so as to prevent the arbitrary or capricious imposition of that penalty. We are of the opinion that the procedures prescribed in Rule 47 are sufficient. By any standard of comparison, where the public policy of a jurisdiction, as reflected in its statutes, authorizes the death penalty, the facts and circumstances of this case justify the action of the jury and of the trial judge in imposing it upon these appellants.

All assignments of error are overruled. The judgment of conviction in each case and the sentence imposed pursuant thereto are affirmed. The sentences will be carried out as provided by law on August 1, 1981, unless otherwise stayed or modified by appropriate authority. Costs are taxed to appellants.

/s/ William J. Harbison
William J. Harbison, Justice

Fones & Cooper, JJ., concur.
Brock, C.J., dissents.

FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

February 17, 1981

STATE OF TENNESSEE, Plaintiff-Appellee,	)	
v.	)	Shelby Criminal No. 5
WILLIAM EDWARD GROSECLOSE and RONALD EUGENE RICKMAN, Defendants-Appellants.	)	Hon. L. T. Lafferty, Judge

OPINION

CONCURRING AND DISSENTING

I concur in affirming the conviction of the defendants for first degree murder. I dissent, however, from the sentence of death, for the reasons expressed in *State v. Jeffrey Stuart Dicks*, released February 2, 1981.

/s/ Ray L. Brock, Jr.
BROCK, J.